SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 625.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

F. W. KEITEL, ARIE KEITEL, FRANK P. FAY, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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1 Pleas in the District Court of the United States for the District of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the tenth day of June, A. D. 1907, the same being one of the regular juridical days of the May term, A. D. 1907, of said court; present, the honorable Robert E. Lewis, district judge, the following proceeding was had and entered of record in said court, to wit:

In the matter of the grand jury.

At this day come the members of the grand jury heretofore duly impanelled and sworn as grand jurors, and return into court now here the following true bill of indictment, to wit:

THE UNITED STATES OF AMERICA *vs.* F. W. KEITEL, ARIE KEITEL, FRANK P. FAY, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck.	2022. Indictment for conspiracy.

Endorsed:) A true bill. (Signed) E. D. WELKER, foreman.

2 And thereupon it is ordered by the court that a bench warrant issue without delay against the defendants and returnable forthwith; and that the defendants be let to bail before an United States commissioner in the sum of five thousand dollars ($5,000) each for their appearance in this court from day to day and from term to term to answer unto the indictment herein.

Thirty-ninth day, May term, Saturday, June 22nd, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the seventh day of May, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* F. W. KEITEL, ARIE KEITEL, FRANK P. FAY, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck.	2022. Indictment for conspiracy.

At this day comes Earl M. Cranston, esquire, district attorney, who prosecutes the pleas of the United States in this behalf. And thereupon, on his motion;

It is ordered by the court that the defendants give bond before an United States commissioner for their appearance in this court from

day to day and from term to term to answer unto the indict-
3 ment herein as follows, to wit: F. W. Keitel in the sum of five thousand dollars ($5,000), Arie Keitel in the sum of five thousand dollars ($5,000), Frank P. Fay in the sum of five thousand dollars ($5,000), Lewis M. Rumsey in the sum of five thousand dollars ($5,000), William Baer in the sum of three thousand dollars ($3,000), Walter S. Price in the sum of three thousand dollars ($3,000), Charles H. Dodge in the sum of two thousand dollars ($2,000), Anna Dodge in the sum of two thousand dollars ($2,000), Charles F. W. Haberbeck in the sum of two thousand dollars ($2,000), Magdalena Haberbeck in the sum of two thousand dollars ($2,000), and Gus Haberbeck in the sum of two thousand dollars ($2,000).

And the said indictment is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA,

District of Colorado, ss:

At the May term of the District Court of the United States, within and for the District of Colorado, in the year of our Lord one thousand nine hundred and seven, begun and held at the city of Denver, in said district, on the first Tuesday in May, in the year of our Lord one thousand nine hundred and seven.

The grand jurors of the United States of America within
4 and for the District of Colorado, good and lawful men, duly selected, impanelled, sworn, and charged by said court to inquire within and for the District of Colorado, on their oaths do present that F. W. Keitel, whose first real and true name is to the grand jurors unknown, Arie Keitel, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck, whose first real and true name is to the grand jurors unknown, hereinafter in this indictment called the defendants, late of the District of Colorado, heretofore, to wit, on the eleventh day of June, in the year of our Lord one thousand nine hundred and four, in the county of Garfield, in the county of Routt, in the county of Denver, and within the said District of Colorado, and within the jurisdiction of this court, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly conspire, combine, confederate, and agree together, and with T. O. Hyman, whose first real and true name is to the grand jurors unknown, Joseph L. Kolley, Patrick H. Clark, William P. Lightholder, Fred Schindler, Edward L. Eisleben, Bert.

E. Shea, and Louis Kollmeyer, hereinafter referred to as agents
5 of the said defendants, and also with divers other persons to the grand jurors unknown, to make false, fictitious, feigned, illegal, forged, and fraudulent entries and filings, and to induce, persuade, procure, and hire divers other persons hereinafter called entrymen, and mentioned by name as such in that part of this indictment wherein overt acts are charged to have been committed by said defendants, being overt acts numbered from one to twenty-four, both

inclusive, to make false, fictitious, illegal, feigned, forged, and fraudulent entries and declaratory statements, applications to enter, powers of attorney, nonmineral affidavits and affidavits at purchase in said entries, at the land office of the said United States at Glenwood Springs, in said county of Garfield aforesaid, of certain tracts of coal lands of the said United States, to wit, the tracts mentioned and described by legal subdivisions in the said overt acts of this indictment, as well as other tracts of land to the grand jurors unknown, in all amounting to a large number of acres, to wit, five thousand acres, said lands being then and there of great value, to wit, of the value of five hundred thousand dollars, and at and in the making of such false,
6 fictitious, feigned, illegal, forged, and fraudulent entries and declaratory statements, applications to enter, and powers of attorney, nonmineral affidavits and affidavits at purchase in said entries, to make representations and statements of fact to the register and receiver of the said land office, which would be known by the said defendants, agents, and entrymen to be false, fraudulent, forged, and untrue in certain matters hereinafter specified, and thereby wrongfully, unlawfully, fraudulently, and deceitfully cause the register and receiver, and also the Commissioner of the General Land Office of the United States, to act respectively in administering the said laws and regulations in that behalf made in pursuance of law otherwise than they would or lawfully could act were they aware of such falsity, fraud, forgery, and misrepresentation in the said representations, statements, and matters and entries above referred to, that is to say, cause the said register, receiver, and Commissioner of the General Land Office to accept such false, fictitious, feigned, illegal, forged, and fraudulent entries and filings hereinabove specified from said defendants, agents, and entrymen, and approve and make sales of such lands to such entrymen, agents, and
7 defendants, and take the necessary steps to cause patents for such lands to be issued by the said United States to the said entrymen, agents, and defendants: and this in such ent*ires* where the said register and receiver and the Commissioner of the General Land Office of the United States would have no knowledge, respectively, as to such facts and of said false, fraudulent, feigned, illegal, forged, and fictitious entries, and would be authorized and required by the said laws and regulations to receive and act upon such fraudulent, false, and untrue statements and representations and false, fictitious, illegal, feigned, forged, and fraudulent entries as though they were true and in compliance with said laws and regulations; it being, as the grand jurors aforesaid upon their oaths aforesaid charge the fact to be, the intention and design of the said defendants, combining, conspiring, and agreeing as aforesaid, and with their said agents and divers other persons to the grand jurors unknown, to furnish such entrymen with the moneys necessary to make a payment to the receiver of the said land office of the price fixed by law for the said lands, and thereupon require and receive conveyances from the said entrymen and agents to be

made to themselves, the said defendants, and the Yampa Anthracite Coal Company, a corporation, of the title to the said lands, as is hereinafter more particularly set forth; and thereby the said de-
8 fendants unlawfully, corruptly, willfully, and knowingly did conspire, combine, confederate, and agree together, and with their said agents and said divers other persons to the grand jurors unknown, by means of said false, fictitious, illegal, feigned, untrue, forged, and fraudulent entries and filings hereinabove referred to, indirectly, deceitfully, and fraudulently to obtain for themselves and the said corporation from the said United States certain of the public lands and property of the said United States above referred to, in quantity greatly in excess of that which either or any or all of the said defendants and said corporation would lawfully be allowed to obtain directly from the United States under a lawful administration of the said laws and regulations and by means of legal and valid entries of said lands, and in that manner to defraud the said United States of its valuable property in such lands, and also of its governmental function in the matter of preserving and disposing of the said lands, as well as out of its right to administer an intelligent and honest service in that behalf in the interests of the people of the said United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said unlawful conspiracy, confederation, and agreement then and there was one growing out of and based upon the existence of the facts and transactions herein set forth, and
9 was to be effected in the manner and by the means and methods now here described; that is to say, on the said eleventh day of June, in the year of our Lord one thousand nine hundred and four, there was lying in the Glenwood Springs land district, and within the said District of Colorado, certain surveyed vacant public lands of the said United States known as coal lands, not then otherwise appropriated or reserved by competent authority, or containing valuable minerals other than coal, which were then open to entry at the said land office at Glenwood Springs aforesaid under the laws of the said United States pertaining to the entry and sale of such lands and under the rules and regulations theretofore made and prescribed pursuant to law by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior; that is to say, the coal lands mentioned and described in this indictment and by legal subdivisions in the said overt acts numbered one to twenty-four, inclusive, in the first count, and one to sixteen in the second count, and the said defendants directly and through their said agents, by persuasion, promise, solicitation, and payment of reward to said entrymen and agents in some small sum, the amount whereof is to the grand jurors unknown, to induce, procure, and hire the said entrymen and agents to make said false, fictitious, feigned,
10 illegal, forged, and fraudulent entries of said coal lands and filings hereinabove referred to at the said land office with the

said register and receiver in the quantities allowed by law, in pursuance of said conspiracy, combination, and agreement between the said defendants and their agents and the said entrymen, under which the said entrymen and agents and defendants were severally falsely and fraudulently to execute and furnish to the said register and receiver all the necessary papers, declarations, and statements and filings above specified, falsely purporting to be under oath in said false, fictitious, illegal, feigned, forged, and fraudulent entries in lieu of the honest, bona fide entries, papers, and filings required by the said laws and regulations from such entrymen in connection with the making of such entries, to the effect that each of said entrymen hereinafter charged in the several overt acts was then and there purchasing and intending to purchase his respective tract of such land for himself, and not directly or indirectly for the use and benefit of any other person; that he was then in the actual possession of the same; whereas, in truth and in fact, such statements, representations, affidavits, and filings in such entries would not be made under oath and subscribed and sworn to before any officer competent to
11 administer an oath, and the jurat attached thereto, respectively, would be false, fictitious, forged, and fraudulent, and such entrymen would then well know he would not then be purchasing or intending to purchase such land for himself at all, but in collusion with and for the benefit of the said defendants and the said corporation, and would not then be in the actual possession of the same, but upon the contrary would be purchasing and intending to purchase his tract of such land for the use and benefit, as he would know, of the said defendants and the said corporation, and under which said agreement the said entrymen were by means of such false, fictitious, illegal, feigned, forged, and fraudulent entries, and by payment to the said receiver of the said land office of the price fixed by law for such coal lands, to obtain from the said United States its title by patent to, and the possession and the use and benefit of, such coal lands (which said money was, as aforesaid, to be furnished to the said entrymen by the said defendants), and under which agreements also the said entrymen were thereupon severally to make conveyances of the title to the said coal lands to the said defendants and said corporation.

(1) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that in pursuance of the said unlawful
12 conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel, afterwards on, to wit, the twenty-first day of June, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in said county of Garfield, in said District of Colorado, did then and there file, and cause to be filed, with the said register and receiver of the said land office at Glenwood Springs aforesaid, coal cash entry number 246, of one Fred William Margenau and the papers, statements, and affidavits therein, to wit, declaratory statements, power of attorney, nonmineral affidavit, cor-

roborating nonmineral affidavits, and application at purchase for the following-described coal lands of the United States, to wit, the northeast quarter of section fifteen, township eight north, range eighty-seven west of the sixth principal meridian, in Colorado, the said defendants having theretofore procured, hired, induced, and persuaded the said Fred William Margenau to subscribe his name to the said false, fictitious, forged, and fraudulent papers in said coal-land entry, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

13 (2) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that further, in pursuance of the said unlawful conspiracy, combination, confederation, and agreement and to effect the object of the same, the said F. W. Keitel and Arie Keitel on, to wit, the thirteenth day of June, in the year of our Lord one thousand nine hundred and four, at Hayden, in Routt County, in the said District of Colorado, did then and there unlawfully, willfully, and knowingly induce, persuade, and hire one R. L. Barnes, whose first real and true name is to the grand jurors unknown, to them and there subscribe his name to a certain nonmineral affidavit required by law and the rules and regulations of the Interior Department of the United States in the said above-described coal-land entry of Fred William Margenau, to which affidavit the said R. L. Barnes did not make oath, and thereafter filed the same and caused the same to be filed with the register and receiver of the United States land office at Glenwood Springs aforesaid, in the District of Colorado, as a part of the said coal-land entry.

(3) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, in further pursuance of said unlawful

14 conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-first day of June, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in the county of Garfield, in the District of Colorado, did then and there file and cause to be filed with the said register and receiver of the said land office at Glenwood Springs aforesaid, coal cash entry number 242 of one Charles H. Dodge, and the papers, statements, and affidavits therein, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase for the following-described coal lands of the United States, to wit, the southeast quarter of section fifteen, in township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, the said defendant Charles H. Dodge having theretofore made and executed the said false, fictitious, and fraudulent papers in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(4) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of said unlawful con-

spiracy, combination, confederation, and agreement and to
15 effect the object of the same, the said F. W. Keitel and Arie Keitel, on, to wit, the thirteenth day of June, in the year of our Lord one thousand nine hundred and four, at Hayden, in Routt County, in the said District of Colorado, did then and there unlawfully, willfully, and knowingly induce, persuade, and hire one R. L. Barnes, whose first real and true name is to the grand jurors unknown, to then and there subscribe his name to a certain nonmineral affidavit required by law and the rules and regulations of the Interior Department of the United States in the said above-described coal-land entry of Charles H. Dodge, to which affidavit the said R. L. Barnes did not make oath, and thereafter filed the same and caused the same to be filed with the register and receiver of the United States land office at Glenwood Springs aforesaid, in the District of Colorado, as a part of the said coal-land entry.

(5) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, in further pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, on, to wit, the twenty-first day of June, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in the county of Garfield, in the District
16 of Colorado, did then and there file and cause to be filed with the said register and receiver of the said land office at Glenwood Springs aforesaid, coal cash entry number 244, of one Gus Haberbeck, and the statements, papers, and affidavits therein, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase for the following-described coal lands of the United States, to wit, the southwest quarter of section fifteen, township eight north, range eighty-seven west of the sixth principal meridian in Colorado, the said defendant Gus Haberbeck having therefore made and executed said false, fictitious, and fraudulent papers in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(6) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said F. W. Keitel and Arie Keitel, on, to wit, the thirteenth day of June, in the year of our Lord one thousand nine hundred and four, at Hayden, in Routt County, in the said District of Colorado, did then and there unlawfully, willfully, and knowingly induce, persuade, and hire one R. L. Barnes, whose first
17 real and true name is to the grand jurors unknown, to then and there subscribe his name to a certain nonmineral affidavit required by law and the rules and regulations of the Interior Department of the United States in the said above-described coal-land entry of Gus Haberbeck, to which affidavit the said R. L. Barnes did not make oath, and thereafter filed the same and caused the same to be

filed with the register and receiver of the United States land office at Glenwood Springs aforesaid, in the District of Colorado, as a part of the said coal-land entry.

(7) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-first day of June, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in said county of Garfield, in said District of Colorado, did then and there file and cause to be filed with the said register and receiver of the said land office at Glenwood Springs aforesaid, coal cash entry number 247, of one Magdalena Haberbeck, and the papers, statements, and affidavits therein, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits,
and application at purchase for the following-described coal
18 lands of the United States, to wit, the northwest quarter of section fifteen, township eight north, of range eighty-seven west of the sixth principal meridian in Colorado, the said defendant Magdalena Haberbeck having theretofore made and executed the said false, fictitious, and fraudulent papers in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(8) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said F. W. Keitel and Arie Keitel, on, to wit, the thirteenth day of June, in the year of our Lord one thousand nine hundred and four, at Hayden, in Routt County, in the said District of Colorado, did then and there unlawfully, willfully, and knowingly induce, persuade, and hire one R. L. Barnes, whose first real and true name is to the grand jurors unknown, to then and there subscribe his name to a certain nonmineral affidavit required by law and the rules and regulations of the Interior Department of the United States in the said above-described coal-land entry of Magdalena Haberbeck, to which affidavit the said R. L. Barnes did not make oath, and thereafter filed the same and caused the same to be filed with the
19 register and receiver of the United States land office at Glenwood Springs aforesaid, in the District of Colorado, as a part of the said coal-land entry.

(9) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel afterwards, to wit, on the tenth day of December, in the year of our Lord one thousand nine hundred and four, at the city of Denver, in the county of Denver, in said District of Colorado, did then and there make a certain nonmineral affidavit in the matter of the coal cash entry of H. A. Meyer, whose first real and true name is to the grand jurors

unknown, and subscribed his name to the same and made oath to the same before Charles J. Munz, a notary public duly authorized to administer said oath under the laws of the United States, and thereafter file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the District of Colorado, coal cash entry number 279, of the said H. A. Meyer, and the said nonmineral affidavit therein, together with other papers, statements, and affidavits therein, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits,
20 and application at purchase for the following-described coal lands of the United States, to wit, the northwest quarter of the northeast quarter and the north half of the northwest quarter, section twenty-four, township eight north, range eighty-seven west of the sixth principal meridian, in Colorado, the said defendants having theretofore procured, hired, induced, and persuaded the said H. A. Meyer, whose first real and true name is to the grand jurors unknown, to subscribe his name to the said false, fictitious, forged, and fraudulent papers in said coal-land entry, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(10) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel afterwards, to wit, on the twenty-fourth day of December, in the year of our Lord one thousand nine hundred and four, at the city of Denver, in the county of Denver, in said District of Colorado, did then and there make a certain nonmineral affidavit in the matter of the
21 coal cash entry of Ben Hock, and subscribed his name to the same and made oath to the same before Charles J. Munz, a notary public duly authorized to administer said oath under the laws of the United States, and thereafter file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the District of Colorado, coal cash entry number 281, of the said Ben Hock, and the said nonmineral affidavit therein, together with other papers, statements, and affidavits therein, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application to purchase, for the following-described coal lands of the United States, to wit, the southeast quarter of section twenty-five, in township eight north, range eighty-seven west of the sixth principal meridian, in Colorado, the said defendants having theretofore procured, hired, induced, and persuaded the said Ben Hock to subscribe his name to the said false, fictitious, forged, and fraudulent papers in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said lands.

(11) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of the said unlawful

22 conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, on, towit, the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in said county of Garfield, in said District of Colorado, did then and there file and cause to be filed with the said register and receiver of the said land office at Glenwood Springs aforesaid coal cash entry number 276, of one Anna Dodge, and the papers, statements, and affidavits therein, towit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase, for the following-described lands of the United States, to wit, the northeast quarter of the southeast quarter, the east half of the northeast quarter, and the southwest quarter of the northeast quarter of section twenty-four, township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, the said defendant Anna Dodge, having theretofore made and executed the said false, fictitious, and fraudulent papers in said coal-land entry, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(12) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of the said un-

23 lawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel afterwards, on, to wit, the tenth day of December, in the year of our Lord one thousand nine hundred and four, at the city of Denver, in the county of Denver, in said District of Colorado, did then and there make a certain nonmineral affidavit in the matter of the coal cash entry of Anna Dodge, and subscribed his name to the same, and made oath to the same before Charles J. Munz, a notary public duly authorized to administer said oath under the laws of the United States, and thereafter filed and caused to be filed with the register and receiver of the United States land office at Glenwood Springs, in the District of Colorado, coal cash entry No. 276, of the said Anna Dodge, and the said nonmineral affidavit therein, together with other papers, statements, and affidavits, to wit, declaratory statement, power of attorney, nonmineral affidavit, and application at purchase, for the following-described coal lands of the United States, to wit, the northeast quarter of the southeast quarter, the east half of the northeast quarter, and the southwest quarter of the northeast quarter of section twenty-four, in township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, the said defendant Anna Dodge having theretofore made and

24 executed the said false, fictitious, forged, and fraudulent papers in said coal-land entry, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(13) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in said county of Garfield, in said District of Colorado, did then and there file and cause to be filed with the register and receiver of the said land office at Glenwood Springs aforesaid, coal cash entry number 272, of one Matthew T. Durnin, and the papers, statements, and affidavits therein, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase for the following-described coal lands of the United States, to wit, the northwest quarter of section twenty-five, in township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, the said defendants having theretofore procured, hired, induced, and persuaded the said Matthew T. Durnin to subscribe his name
25 to the said false, fictitious, forged, and fraudulent papers in said coal-land entry, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(14) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in said county of Garfield, in said District of Colorado, did then and there file and cause to be filed with the register and receiver of the said land office at Glenwood Springs aforesaid, in coal cash entry number 272, of one Matthew T. Durnin, a certain power of attorney constituting and appointing one William B. Rodda as the true and lawful agent and attorney for Matthew T. Durnin in said coal cash entry number 272 in the matter of the entry of the following-described lands, to wit, the northwest quarter section twenty-five, township eight north, range eighty-seven west of the sixth principal meridian, in Colorado, the defendants having theretofore on, to wit, the eleventh day of June, in the year of our Lord one thousand nine hundred and four, procured, hired,
26 induced, and persuaded the said Matthew T. Durnin to subscribe his name to said false, fictitious, forged, and fraudulent power of attorney without appearing before any officer competent to administer an oath, and without making oath to the same, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(15) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of the said unlawful

conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards on, to wit, the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in said county of Garfield, in said District of Colorado, did then and there file and cause to be filed with the said register and receiver of the said land office at Glenwood Springs aforesaid, coal cash entry number 270, of one Joseph P. Hartnett, and the papers, statements, and affidavits therein, to wit, declaratory statement, power of attorney, nonmineral affidavits, corroborating nonmineral affidavits, and application at purchase for the following-described coal lands of the United States, to wit, the southwest quarter of section twenty-four, township eight north, of range eighty-seven west of the sixth principal meridian in Colorado, the
27 said defendants having theretofore procured, hired, induced, and persuaded the said Joseph P. Hartnett to subscribe his name to the said false, fictitious, forged, and fraudulent papers in said coal-land entry, in collusion with the defendants and to defraud the United States out of the title to and the use and possession of said coal lands.

(16) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in said county of Garfield, in said District of Colorado, did then and there file and cause to be filed with the register and receiver of the said land office at Glenwood Springs aforesaid, in coal cash entry number 270, of one Joseph P. Hartnett, a certain power of attorney constituting and appointing one William B. Rodda as the true and lawful agent and attorney for Joseph P. Hartnett in said coal entry number 270, in the matter of the entry of the following-described lands, to wit, the southwest quarter section twenty-four, township eight north, of range eighty-seven west of the sixth principal meridian in Colorado, the defendants having therefore, on, to wit, the eleventh day of June, in the
28 year of our Lord one thousand nine hundred and four, procured, hired, induced, and persuaded the said Joseph P. Hartnett to subscribe his name to said false, fictitious, forged, and fraudulent power of attorney without appearing before any officer competent to administer an oath, and without making oath to the same, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(17) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, on, to wit, the twenty-seventh day of December,

in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in the county of Garfield, in said District of Colorado, did then and there file and cause to be filed with the said register and receiver of the said land office at Glenwood Springs aforesaid, coal-cash entry number 274, of one Kate M. Kaplinger, and the papers, statements, and affidavits therein, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase, for the
29 following-described coal lands of the United States, to wit, the south half of the northwest quarter of section twenty-four, township eight north, of range eighty-seven west of the sixth principal meridian in Colorado, the said defendants having theretofore procured, hired, induced, and persuaded the said Kate M. Kaplinger to subscribe her name to the said false, fictitious, forged, and fraudulent papers in said coal-land entry, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(18) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in said county of Garfield in said District of Colorado, did then and there file and cause to be filed with the register and receiver of the said land office at Glenwood Springs aforesaid, in coal cash entry No. 274, of one Kate M. Kaplinger, a certain power of attorney constituting and appointing one William B. Rodda as the true and lawful agent and attorney for Kate
30 M. Kaplinger in said coal cash entry No. 274, in the matter of the entry of the following-described lands, to wit, the south half of the northwest quarter of section twenty-four, to township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, the defendants having theretofore, on, to wit, the eleventh day of June, in the year of our Lord one thousand nine hundred and four, procured, hired, induced, and persuaded the said Kate M. Kaplinger to subscribe her name to said false, fictitious, forged, and fraudulent power of attorney, without appearing before any officer competent to administer an oath, and without making oath to the same, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(19) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, on, to wit, the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, at Glenwood

Springs aforesaid, in said county of Garfield, in said district of Colorado, did then and there file and cause to be filed with the said
31 register and receiver of the said land office at Glenwood Springs aforesaid, coal cash entry number 271, of one T. V. Hyman, whose first real and true name is to the grand jurors unknown, and the papers, statements, and affidavits therein, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase, for the following-described coal lands of the United States, to wit, the southwest quarter of section twenty-five, township eight north, range eighty-seven west of sixth principal meridian, in Colorado, the said defendants having theretofore procured, hired, induced, and persuaded the said T. V. Hyman to subscribe his name to the said false, fictitious, forged, and fraudulent papers in said coal-land entry, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(20) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in said county of Garfield, in said District of Colorado, did then and there file and cause to
32 be filed with the register and receiver of the said land office at Glenwood Springs aforesaid, in coal cash entry number 271, of one T. O. Hyman, a certain power of attorney constituting and appointing one William B. Rodda as the true and lawful agent and attorney for W. O. Hyman in said coal cash entry number 271, in the matter of the entry of the following-described lands, to wit, the southwest quarter of section twenty-five, township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, the defendants having heretofore, on, to wit, the thirteenth day of June, in the year of our Lord one thousand nine hundred and four, procured, hired, induced, and persuaded the said T. O. Hyman to subscribe his name to said false, fictitious, forged, and fraudulent power of attorney without appearing before any officer competent to administer an oath, and without making oath to the same, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(21) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-seventh day
33 of December, in the year of our Lord one thousand nine hundred and four, at Glenwood Springs aforesaid, in said county of Garfield, in said District of Colorado, did then and there file and

cause to be filed with the said register and receiver of the said land office at Glenwood Springs aforesaid, coal cash entry number 278, of one Charles F. W. Haberbeck, and the papers, statements, and affidavits therein, to wit, declaratory statements, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase, for the following-described coal lands of the United States, to wit, the southwest quarter of section thirteen, township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, the said defendant Charles F. W. Haberbeck having theretofore made and executed the said false, fictitious, and fraudulent papers in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(22) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said F. W. Keitel afterwards, to wit, on the tenth day of December, in the year of our Lord one thou-
34 sand nine hundred and four, at the city of Denver, in the county of Denver, in said District of Colorado, did then and there make a certain nonmineral affidavit in the matter of the coal cash entry of Charles F. W. Haberbeck and subscribed his name to the same, and made oath to the same before Charles J. Munz, a notary public, duly authorized to administer said oath under the laws of the United States, and thereafter filed and caused to be filed with the register and receiver of the United States land office at Glenwood Springs, in the District of Colorado, coal cash entry number 278, of the said Charles F. W. Haberbeck, and the said nonmineral affidavit therein, together with other papers, statements, and affidavits therein, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase, for the following-described coal lands of the United States, to wit, the southwest quarter of section thirteen, township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, the said defendant Charles F. W. Haberbeck having theretofore made and executed the said false, fictitious, and fraudulent papers in said coal-land entry, in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

35 (23) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, on, to wit, the second day of February, in the year of our Lord one thousand nine hundred and five, at Glenwood Springs aforesaid, in said county of Garfield, in said District of Colorado, did then and there file and cause to be filed with

the said register and receiver of the said land office at Glenwood Springs aforesaid, coal cash entry number 293, of one John F. Lucas, and the papers, statements, and affidavits therein, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase, for the following-described coal lands of the United States, to wit, the east half of the southeast quarter of section twenty-eight, township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, the said defendants having theretofore procured, hired, induced, and persuaded the said John F. Lucas to subscribe his name to said false, fictitious, forged, and fraudulent papers in said coal-land entry, in collusion with the defendants and to defraud the United
36 States out of the title to and the use and benefit of said coal lands.

(24) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said F. W. Keitel and Arie Keitel, on, to wit, the seventeenth day of December, in the year of our Lord one thousand nine hundred and four, at the city of Denver, in the county of Denver, in the said District of Colorado, did then and there unlawfully, willfully, and knowingly induce, persuade, and hire one E. A. Hewitt, whose first real and true name is to the grand jurors unknown, to then and there subscribe his name to a certain nonmineral affidavit required by law and the rules and regulations of the Interior Department of the United States, in the said above-described coal-land entry of John F. Lucas, to which affidavit the said E. A. Hewitt did not make oath, and thereafter filed the same and caused the same to be filed with the register and receiver of the United States land office at Glenwood Springs aforesaid, in the District of Colorado, as a part of the said coal-land entry.

Contrary to the form, force, and effect of the statute of the United States of America in such case made and provided and against
37 the peace and dignity of the said United States.

EARL M. CRANSTON,
United States Attorney.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that F. W. Keitel, first real and true name to the grand jurors unknown, Arie Keitel, Frank P. Fay, Lewis M. Rumsay, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck, first real and true name to the grand jurors unknown, hereinafter in this indictment called the defendants, late of the District of Colorado, heretofore, to wit, on the eleventh day of June, in the year of our Lord one thousand nine hundred and four, in the

counties of Garfield, Routt, and Denver, within the said District of Colorado, and within the jurisdiction of this court, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly conspire, combine, confederate, and agree together and with T. V. Hyman, whose first real and true name is to the grand jurors unknown, Joseph L. Kolley, Patrick H. Clark, William P. Lightholder, Fred Schindler, Edward Eisleben, Bert E. Shea, Louis Kollmeyer,

38 hereinafter referred to as agents of the said defendants, and with divers other persons to the grand jurors unknown, to make and present false, fictitious, feigned, illegal, forged, and fraudulent filings, declarations, affidavits, certificates, and papers and writings purporting to be such, to the register and receiver of the United States land office at Glenwood Springs, in the District of Colorado, in certain coal-land entries hereinafter referred to, and to procure, induce, persuade, and hire divers other persons hereinafter called entrymen and mentioned by name as such in that part of this indictment wherein overt acts are charged to have been committed by said defendants, being overt acts numbered from one to sixteen, both inclusive; to make and subscribe, and present and cause to be made, subscribed, and presented to the said register and receiver of the United States land office at said Glenwood Springs, in the county of Garfield, District of Colorado, said false, fictitious, feigned, illegal, forged, and fraudulent filings, declarations, affidavits, and certificates, respectively, and papers and writings purporting to be such, pertaining to the entry of said coal lands under the laws of the United States, hereinafter more particularly referred to and described in that part of this indictment charging overt acts, and then and there a matter and proceeding within the jurisdiction of the Secretary of the Interior of the United States, in violation of section

39 4746 of the Revised Statutes of the United States; that is to say, filings, declarations, affidavits, and certificates, and papers and writings purporting to be such, of the said entrymen and agents, respectively, partly written and partly printed, and then and there to contain amongst other things certain representations and statements material to said matters within the jurisdiction of the said Secreary of the Interior; that is to say, that they, the said agents and entrymen, were to make entry, respectively, as aforesaid, of the lands in said filings, declarations, and affidavits described for their own use and benefit, and representations and statements in said papers to the effect that they would not make entry, respectively, of the said lands, directly or indirectly, for the use or benefit of any other party, and which said filings, declarations, affidavits, and certificates, and papers and writings purporting to be such, then and there would be, as the defendants, agents, and entrymen would well know at the time and place they should so make and procure the same to be made, and subscribe and present as aforesaid, respectively, pertaining to the matter of the application of the said entrymen and

agents to the register and receiver of the said land office of the said United States to enter under the laws of the United States pertaining to the entry of vacant coal lands of the said United States
40 mentioned and described in the said filings, declarations, and affidavits, and papers and writings purporting to be such and hereinafter described; the said representations in the said filings, declarations, affidavits, and certificates, and papers and writings purporting to be such, then and there would be material in the making of said entries, in this, that it would be necessary in order to the due administration of the said laws that the said register and receiver and the said Secretary of the Interior should thereby be truly informed whether or not the said entrymen, agents, and defendants, respectively, would then be making application to enter the said lands hereinafter described for their own use and benefit and not for the use and benefit of any other party; and which said filings, declarations, affidavits, certificates, and papers and writings purporting to be such, then and there as the defendants, and each of them, and the said agents and entrymen would well know would be false, fictitious, feigned, illegal, forged, and fraudulent filings, declarations, affidavits, and certificates, and papers and writings purporting to be such, in said entries and containing false and fraudulent statements material to the matters aforesaid in this, that the said agents and entrymen, respectively, then and there would not make and apply to make entry of the said coal lands for their own use and benefit, and would not then and there in fact be making and applying
41 to make entry and filings of said coal lands for the use and benefit of the entrymen and agents, respectively, but for the use and benefit of and in collusion with the said defendants and the said Yampa Anthracite Coal Company, a corporation, the said lands then and there in fact being lands of the United States open to such entry.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said unlawful conspiracy, combination, confederation, and agreement then and there was one growing out of and based upon the existence of the facts and circumstances herein set forth, and was to be effected in the manner and by the means and methods now here described; that is to say, on the said eleventh day of June, in the year of our Lord one thousand nine hundred and four, there was lying in the Glenwood Springs land district, and within the said District of Colorado, certain surveyed vacant public lands of the United States known as coal lands, not then otherwise appropriated, or reserved by competent authority, or containing valuable minerals other than coal, which were then open to entry at the said land office at Glenwood Springs aforesaid under the laws of the said United States pertaining to the entry and sale of such lands and under the rules and regulations theretofore made and prescribed pursuant to law by the Commissioner of the General Land Office,
42 with the approval of the Secretary of the Interior; that is to say, the coal lands mentioned and described by legal subdi-

visions in the said overt acts numbered one to sixteen, inclusive; and the said defendants directly and through their said agents, by persuasion, promise, solicitation, and payment of reward to said entrymen and agents in some small sum, the amount whereof is to the grand jurors unknown, to induce, procure, and hire the said entrymen and agents to make said false, fictitious, feigned, illegal, forged, and fraudulent entries of said coal lands and filings hereinabove referred to at the said land office with the said register and receiver in the quantities allowed by law, in pursuance of said conspiracy, combination, and agreement between the said defendants and their agents and the said entrymen, under which the said entrymen and agents and defendants were severally falsely and fraudulently to execute and furnish to the said register and receiver all the necessary papers, declarations, and statements and filings above specified, falsely purporting to be under oath in said false, fictitious, illegal, feigned, forged, and fraudulent entries in lieu of the honest, bona fide entries, papers, and filings required by the said laws and regulations from such entrymen in connection with the making of such entries, to the effect that each of said entrymen was then and
43 there purchasing and intending to purchase his respective tract of such land for himself, and not directly or indirectly for the use and benefit of any other person; that he was then in the actual possession of the same; whereas, in truth and in fact, such statements, representations, affidavits, and filings in such entries would not be made under oath and subscribed and sworn to before any officer competent to administer an oath, and would not be subscribed in the presence of any officer, and the jurat attached thereto, respectively, would be false, fictitious, forged, and fraudulent, and said papers, to wit, filings, declarations, affidavits, and papers and writings purporting to be such being in fact signed in blank by the said entrymen, respectively, and such entrymen would then well know they would not be purchasing or intending to purchase such land for himself at all, but in collusion with and for the benefit of the said defendants and the said corporation, and would not then be in the actual possession of the same, but, upon the contrary, would be purchasing and intending to purchase his tract of such land for the use and benefit, as he would know, of the said defendants and the said corporation, and under which said agreement the said entrymen were by means of such false, fictitious, illegal, feigned, forged, and fraudulent entries, and by payment to the said receiver of the
44 said land office of the price fixed by law for such coal lands, to obtain from the United States its title by patent to and the possession and the use and benefit of such coal lands (which said money was, as aforesaid, to be furnished to the said entrymen by the said defendants), and under which agreements also the said entrymen were thereupon severally to make conveyances of the title to the said coal lands to the said defendants and said corporation.

(1) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, in pursuance of said unlawful con-

spiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, in the county of Garfield, in the District of Colorado, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly present and cause to be presented, and file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the District of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application to purchase, in coal cash entry number 281,
45 of one Ben Heck, for the following-described coal lands of the United States, to wit, the southeast quarter of section twenty-five, township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, which said power of attorney was and is in the following words and figures, to wit:

Coal lands—Power of attorney.

Know all men by these presents that I, Ben Heck, of the city of St. Louis, State of Missouri, having, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands, made application to purchase the southeast quarter (SE. ¼) of section twenty-five (25), in township eight (8) W., of range eighty-seven (87) W. of the 6th principal meridian, in the district of lands subject to sale at the land office at Glenwood Springs, Colorado, do hereby constitute and appoint F. W. Keitel, of Denver, Colorado, my true and lawful agent and attorney for me in my name and stead, and for my sole use and benefit, to file the same with the register of said land office, to make or procure to be made all necessary and proper affidavits and proofs at any time required, and to file the same in said land office, to make payment for and entry of
46 said land in my name, to do all and singular the acts and things requisite, lawful, and proper to be done in the premises, especially to make the required nonmineral affidavit, as I am assured and believe that he is well acquainted with the character of each and every subdivision of said described land; and to procure for me from the United States the receipt and patent for said lands, as fully and completely as I might or could do, with full power to substitute one or more agents or attorneys for the purposes aforesaid, and to revoke any such appointment, hereby ratifying and confirming all that my said agent and attorney or his substitute may lawfully do in the premises.

In witness whereof I have hereunto set my hand and seal this 20th day of December, 1904.

BEN HECK.

Signed in presence of—
P. O. URBAN and
J. A. SCHELLER.

STATE OF MISSOURI,
City of St. Louis, ss:

On the 20th day of December, A. D. 1904, at my office at St. Louis, Mo., before me, Paul O. Urban, a notary public in and for the county and State aforesaid, personally appeared Ben Heck, known to me to be the same person whose name is subscribed to the
47 foregoing instrument, and acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

My commission expires Oct. 13, A. D. 1908.

P. O. URBAN, *Notary Public.*

P. O. Urban, notary public, City of St. Louis.

That at the time of presenting and causing to be presented and filing and causing to be filed, as aforesaid, said power of attorney the said defendants then and there well knew that said power of attorney was false, fictitious, feigned, illegal, forged, and fraudulent in this, to wit, that the said Ben Heck did not then and there appoint the said F. W. Keitel his true and lawful agent and attorney for his sole use and benefit to file said papers and make said entry with the register and receiver of the said land office at Glenwood Springs aforesaid, and to make payment for said land in said entry for him, the said Ben Heck, and said power of attorney was further false in stating that said Ben Heck had been assured that said F. W. Keitel was well acquainted with the character of each and every subdivision of said land, but in truth and in fact he, the said Ben Heck,
48 made said entry and signed said power of attorney in collusion with and for the use and benefit of the said defendants and said corporation, and the said F. W. Keitel was in truth and in fact to make payment of the purchase price of said lands for the said defendants and the said corporation to the receiver of said land office, and that the said Ben Heck did not know nor was he acquainted with the said F. W. Keitel at the time of making said entry and power of attorney, and was not then and there informed that said F. W. Keitel knew anything whatever about said land, and that said power of attorney was further then and there false, fictitious, illegal, feigned, forged, and fraudulent in this, that the said Ben Heck never subscribed and made oath to the said power of attorney on the twentieth day of December, 1904, or at any other time, before P. O. Urban, notary public, and that the jurat and certificate of said P. O. Urban, notary public, following the signature of the said Ben Heck in said power of attorney, was then and there wholly false, fictitious, feigned, illegal, forged, and fraudulent, as aforesaid, the said defendants having theretofore procured, hired, induced, and persuaded the said Ben Heck to subscribe his name to the said false, fictitious,

feigned, illegal, forged, and fraudulent papers and power of
49 attorney in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(2) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, in the county of Garfield, in the District of Colorado, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the District of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application to purchase in coal cash entry Number 272, of one Matthew T. Durnin, for the following-described coal lands of the United States, to wit, the northwest quarter section twenty-five, township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, which said power of
50 attorney was and is in the following words and figures, to wit:

Coal lands—Power of attorney.

Know all men by these presents that I, Matthew T. Durnin, of the city of St. Louis, State of Missouri, having under the provisions of the Revised Statutes of the United States relating to the sale of coal lands made application to purchase the northwest quarter (NW. ¼) of section 25, in township 8 N., of range 87 W. of the 6th principal meridian, in the district of lands subject to sale at the land office at Glenwood Springs, Colorado, do hereby constitute and appoint Wm. B. Rodda of city and county of Denver, Colorado, my true and lawful agent and attorney, for me in my name and stead, and for my sole use and benefit, to file the same with the register of said land office, to make or procure to be made all necessary and proper affidavits and proofs at any time required, and to file the same in said land office, to make payment for and entry of said land in my name, to do all and singular the acts and things requisite, lawful, and proper to be done in the premises, especially to make the required nonmineral affidavit, as I am assured and believe that he is well acquainted with the character of each and every subdi-
51 vision of said described land; and to procure for me from the United States the receipt and patent for said lands, as fully and completely as I might or could do, with full power to substitute one or more agents or attorneys for the purposes aforesaid, and to revoke any such appointment, hereby ratifying and confirming all

that my said agent and attorney or his substitute may lawfully do in the premises.

In witness whereof I have hereunto set my hand and seal this 11th day of June, 1904.

MATTHEW T. DURNIN.

Signed in presence of—

STATE OF MISSOURI,

City of St. Louis, ss:

On the 11th day of June, A. D. 1904, at my office at St. Louis, Mo., before me, Wm. Baer, a notary public in and for the city and State aforesaid, personally appeared Matthew T. Durnin, known to me to be the same person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

WM. BAER, *Notary Public.*

My commission expires 3/30/A. D. 1907.

Wm. Baer, notary public, city of St. Louis, Mo.

52 That at the time of presenting and causing to be presented and filing and causing to be filed, as aforesaid, said power of attorney the said defendants then and there well knew that said power of attorney was false, fictitious, feigned, illegal, forged, and fraudulent in this, to wit, that the said Matthew T. Durnin did not then and there appoint the said William B. Rodda his true and lawful agent and attorney for his sole use and benefit to file said papers and make said entry with the register and receiver of the said land office at Glenwood Springs aforesaid, and to make payment for said land in said entry for him, the said Matthew T. Durnin; and said power of attorney was further false in stating that said Matthew T. Durnin had been assured that said William B. Rodda was well acquainted with the character of each and every subdivision of said land, but in truth and in fact he, the said Matthew T. Durnin, made said entry and signed said power of attorney in collusion with and for the use and benefit of the said defendants and said corporation, and the said William B. Rodda was in truth and in fact to make payment of the purchase price of said lands for the said defendants and the said corporation to the receiver of said land office, and that the said Matthew T. Durnin did not know nor was he acquainted with

53 the said William B. Rodda at the time of making said entry and power of attorney, and was not then and there informed that said William B. Rodda knew anything whatever about said land, and that said power of attorney was further then and there false, ficticious, illegal, feigned, forged, and fraudulent in this, that the said Matthew T. Durnin never subscribed and made oath to the said power of attorney on the 11th day of June, 1904, or at any other time, before William Baer, notary public, and that the

jurat and certificate of said William Baer, notary public, following the signature of the said Matthew T. Durnin in said power of attorney was then and there wholly false, fictitious, feigned, illegal, forged, and fraudulent, as aforesaid, the said defendants having theretofore procured, hired, induced, and persuaded the said Matthew T. Durnin to subscribe his name to the said false, fictitious, feigned, illegal, forged, and fraudulent papers and power of attorney in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(3) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement
54 aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, in the county of Garfield, in the District of Colorado, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly present and cause to be presented and filed and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the District of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application to purchase in coal cash entry number 270, of one Joseph P. Hartnett, for the following-described coal lands of the United States, to wit, the southwest quarter of section twenty-four, township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, which said power of attorney was and is in the following words and figures, to wit:

Coal lands—Power of attorney.

Know all men by these presents that I, Jos. P. Hartnett, of the city of St. Louis, State of Missouri, having, under the provi-
55 sions of the Revised Statutes of the United States relating to the sale of coal lands, made application to purchase the southwest ¼ (SW. ¼) of section 24, in township 8 N., of range 87 west of the 6th principal meridian, in the district of lands subject to sale at the land office at Glenwood Springs, Colorado, do hereby constitute and appoint Wm. B. Rodda, of city and county of Denver, Colorado, my true and lawful agent and attorney for me in my name and stead, and for my sole use and benefit, to file the same with the register of said land office, to make or procure to be made all necessary and proper affidavits and proofs, at any time required, and to file the same in said land office, to make payment for and entry of said land in my name, to do all and singular the acts and things requisite, lawful, and proper to be done in the premises, especially to make the required nonmineral affidavit, as I am assured and believe that he is well acquainted with the character of each and every subdivision of said described land; and to procure for me from the United States

the receipt and patent for said lands, as fully and completely as I might or could do, with full power to substitute one or more agents or attorneys for the purposes aforesaid, and to revoke any such appointment, hereby ratifying and confirming all that my said agent and attorney or his substitute may lawfully do in the premises.

56 In witness whereof I have hereunto set my hand and seal this 11th day of June, 1904.

JOSEPH P. HARTNETT.

Signed in presence of—

STATE OF MISSOURI,
City of St. Louis, ss:

On the 11th day of June, A. D. 1904, at my office at St. Louis, Mo., before me, Wm. Baer, a notary public in and for the county and State aforesaid, personally appeared Joseph P. Hartnett, known to me to be the same person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

WM. BAER, *Notary Public.*

My commission expires 3/30/A. D. 1907.

William Baer, notary public, city of St. Louis, Mo.

That at the time of presenting and causing to be presented and filing and causing to be filed as aforesaid said power of attorney the said defendants then and there well knew that said power of attorney was false, fictitious, feigned, illegal, forged, and fraudulent in this, to wit, that the said Joseph P. Hartnett did not then

57 and there appoint the said William B. Rodda his true and lawful agent and attorney for his sole use and benefit to file said papers and make said entry with the register and receiver of the said land office at Glenwood Springs aforesaid, and to make payment for said land in said entry for him, the said Joseph P. Hartnett; and said power of attorney was further false in stating that said Joseph P. Hartnett had been assured that said William B. Rodda was well acquainted with the character of each and every subdivision of said land, but in truth and in fact he, the said Joseph P. Hartnett, made said entry and signed said power of attorney in collusion with and for the use and benefit of the said defendants and said corporation, and the said William B. Rodda was in truth and in fact to make payment of the purchase price of said lands for the said defendants and the said corporation to the receiver of said land office, and that the said Joseph P. Hartnett did not know nor was he acquainted with the said William B. Rodda at the time of making said entry and power of attorney, and was not then and there informed that said William B. Rodda knew anything whatever about said land, and that said power of attorney was further then and there false, fictitious, illegal, feigned, forged, and fraudulent in this, that the said Joseph P. Hartnett never subscribed and made oath to the

said power of attorney on the 11th day of June, 1904, or at
58 any other time, before William Baer, notary public, and that the jurat and certificate of the said William Baer, notary public, following the signature of the said Joseph P. Hartnett in said power of attorney was then and there wholly false, fictitious, feigned, illegal, forged, and fraudulent, as aforesaid, the said defendants having theretofore procured, hired, induced, and persuaded the said Joseph P. Hartnett to subscribe his name to said false, fictitious, feigned, illegal, forged, and fraudulent papers and power of attorney in said coal land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(4) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, in the county of Garfield, in the district of Colorado, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood
59 Springs, in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application to purchase in coal cash entry number 271, of one T. O. Hyman, first real and true name to the grand jurors unknown, for the following-described coal lands of the United States, to wit, the southwest quarter section twenty-five, in township eight north, of range eighty-seven west of the sixth principal meridian, in Colorado, which said power of attorney was and is in the following words and figures, to wit:

Coal lands—Power of attorney.

Know all men by these presents that I, T. O. Hyman, of the city of St. Louis, State of Missouri, having under the provisions of the Revised Statutes of the United States relating to the sale of coal lands, made application to purchase the southwest quarter (SW. ¼) of section 25, in township 8 N., of range 87 W., of the 6th principal meridian, in the district of lands subject to sale at the land office at Glenwood Springs, Colorado, do hereby constitute and appoint Wm. B. Rodda, of city and county of Denver, Colorado, my true and lawful agent and attorney, for me in my name and stead, and for
60 my sole use and benefit, to file the same with the register of said land office, to make or procure to be made all necessary and proper affidavits and proofs, at any time required, and to file the same in said land office, to make payment for and entry of said land in my name, to do all and singular the acts and things requisite, law-

ful, and proper to be done in the premises, especially to make the required nonmineral affidavit, as I am assured and believe that he is well acquainted with the character of each and every subdivision of said described land; and to procure for me from the United States the receipt and patent for said lands, as fully and completely as I might or could do, with full power to substitute one or more agents or attorneys for the purposes aforesaid, and to revoke any such appointment, hereby ratifying and confirming all that my said agent and attorney or his substitute may lawfully do in the premises.

In witness whereof I have hereunto set my hand and seal this 13th day of June, 1904.

T. O. HYMAN.

Signed in presence of—

STATE OF MISSOURI,
City of St. Louis, ss:

On the 13th day of June, A. D. 1904, at my office at St.
61 Louis, Mo., before me, Wm. Baer, a notary public in and for the city and State aforesaid, personally appeared T. O. Hyman, known to me to be the same person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

WM. BAER, *Notary Public.*

My commission expires March 30th, A. D. 1907.

Wm. Baer, notary public, city of St. Louis, Mo.

That at the time of presenting and causing to be presented and filing and causing to be filed, as aforesaid, said power of attorney, the said defendants then and there well knew that said power of attorney was false, fictitious, feigned, illegal, forged, and fraudulent in this, to wit, that the said T. O. Hyman did not then and there appoint the said William B. Rodda his true and lawful agent and attorney for his sole use and benefit to file said papers and make said entry with the register and receiver of the said land office at Glenwood Springs aforesaid, and to make payment for said land in said entry for him, the said T. O. Hyman; and said power of
62 attorney was further false in stating that said T. O. Hyman had been assured that said William B. Rodda was well acquainted with the character of each and every subdivision of said land, but in truth and in fact he, the said T. O. Hyman, made said entry and signed said power of attorney in collusion with and for the use and benefit of the said defendants and said corporation, and the said William B. Rodda was in truth and in fact to make payment of the purchase price of said land for the said defendants and the said corporation to the receiver of said land office, and that the said T. O. Hyman did not know nor was he acquainted with the said William B. Rodda at the time of making said entry and power of attorney,

and was not then and there informed that said William B. Rodda knew anything whatever about said land, and that said power of attorney was further then and there false, fictitious, illegal, feigned, forged, and fraudulent in this, that the said T. O. Hyman never subscribed and made oath to the said power of attorney on the 13th day of June, 1904, or at any other time, before William Baer, notary public, and the jurat and certificate of the said William Baer, following the signature of the said T. O. Hyman in said power of attorney was then and there wholly false, fictitious, feigned, illegal, forged, and fraudulent, as aforesaid, the said defendants having theretofore procured, hired, induced, and persuaded the said T. O. Hyman to
63 subscribe his name to the said false, fictitious, feigned, illegal, forged, and fraudulent papers and power of attorney in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(5) And the grand jurors aforesaid upon their oaths aforesaid do further present and say that further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel, afterwards, to wit, on the first day of August, in the year of our Lord one thousand nine hundred and five, in the county of Garfield, in the district of Colorado, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavit, and application to purchase in coal cash entry number 3226 of one Bert E. Shea, for the following-described coal lands of the United States, to wit, the west half of the northeast quarter, the west half of the southeast quarter section twenty-six, and the west half of the north-
64 east quarter, and the west half of the southeast quarter section thirty-five, township six north, of range eighty-six west of the sixth principal meridian, in Colorado, which said power of attorney was and is in the following words and figures, to wit:

Power of attorney—Coal lands.

Know all men by these presents, that we, Bert E. Shea and John Schoener, of the city of St. Louis, and State of Missouri, having under the provisions of the Revised Statutes of the United States relating to the sale of coal lands, made application to purchase the W. ½ of NE. ¼, W. ½ of SE. ¼ of section 26, and W. ½ of NE. ¼, W. ½ of SE. ¼ of section 35, in township 6 north, of range 86 west of the 6th principal meridian, in the district of lands subject to sale at the land office at Glenwood Springs, Colorado, do hereby constitute and appoint Arie Keitel, of Hayden, Colo., our true and lawful agent and

attorney for us in our name and stead and for our sole use and benefit to file the same with the register of said land office, to make or procure to be made all necessary affidavits and proofs at any time
65 required, and to file the same in said land office; to make entry of and payment for said land in our names, to do all and singular the acts and things requisite, lawful, and proper to be done in the premises, especially to make the nonmineral affidavit required as we are assured and believe that he is well acquainted with the character of each and every subdivision of said described land, and to procure for us from the United States the receipt and patent for said lands, as fully and completely as we might or could do, with full power to substitute one or more agents or attorneys for the purposes aforesaid and to revoke any such appointment, hereby ratifying and confirming all that our said agent and attorney or his substitute may lawfully do in the premises.

In witness whereof we have hereunto set our hands and seals this 15th day of July, A. D. 1905.

BERT E. SHEA.
JOHN SCHOENER.

Signed in presence of—

STATE OF MISSOURI,
City of St. Louis, ss:

On the 15th day of July, A. D. 1905, at my office at St. Louis, Mo., before me, Wm. Baer, a notary public in and for the city and State aforesaid, personally appeared Bert E. Shea and John Schoener, known to me to be the same persons whose names are sub-
66 scribed to the foregoing instrument, and acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first written.

WM. BAER, *Notary Public.*

Wm. Baer, notary public, city of St. Louis, Mo.

My commission expires 3/30/1907.

That at the time of presenting and causing to be presented and filing and causing to be filed, as aforesaid, said power of attorney, the said defendants then and there well knew that said power of attorney was false, fictitious, feigned, illegal, forged, and fraudulent in this, to wit, that the said Bert E. Shea did not then and there appoint the said Arie Keitel his true and lawful agent and attorney for his sole use and benefit to file said papers and make said entry with the register and receiver of the said land office at Glenwood Springs aforesaid, and to make payment for said land in said entry for him, the said Bert E. Shea; and said power of attorney was further false in stating that said Bert E. Shea had been assured that said Arie Keitel was well acquainted with the character of each and every subdivision of said land, but in truth and in fact he, the said

Bert E. Shea, made said entry and signed said power of attor-
67 ney in collusion with and for the use and benefit of the said defendants and said corporation, and that the said Arie Keitel was in truth and in fact to make payment of the purchase price of said lands for the said defendants and the said corporation to the receiver of said land office, and that the said Bert E. Shea did not know nor was he acquainted with the said Arie Keitel at the time of making said entry and power of attorney, and was not then and there informed that said Arie Keitel knew anything whatever about said land, and that said power of attorney was further then and there false, fictitious, illegal, feigned, forged, and fraudulent in this, that the said Bert E. Shea never subscribed and made oath to the said power of attorney on the 15th day of July, 1905, or at any other time, before William Baer, notary public, and that the jurat and certificate of said William Baer, notary public, following the signature of the said Bert E. Shea in said power of attorney was then and there wholly false, fictitious, feigned, illegal, forged, and fraudulent, as aforesaid, the said defendants having theretofore procured, hired, induced, and persuaded the said Bert E. Shea to subscribe his name to the same false, fictitious, feigned, illegal, forged, and fraudulent papers and power of attorney in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

68 (6) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the first day of August, in the year of our Lord one thousand nine hundred and five, in the county of Garfield, in the district of Colorado, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavit, and application to purchase in coal cash entry number 3222 of one William P. Lightholder, for the following described coal lands of the United States, to wit, the northeast quarter and the southeast quarter of section 30, in township six north, of range eighty-six west of the sixth principal medidian in Colorado, which said power of attorney was and is in the following words and figures, to wit:

69 *Power of attorney—Coal lands.*

Know all men by these presents, that we, Richard E. Morris and Wm. P. Lightholder, the , of and , State of , having under the provisions of the Revised Statutes of the

United States relating to the sale of coal lands, made application to purchase the N. E. ¼ and S. E. ¼ of section 30, in township 6 north, of range 86 west of the 6th principal meridian in the district of lands subject to sale at the land office at Glenwood Springs, Colorado, do hereby constitute and appoint Arie Keitel, of Hayden, Colo., our true and lawful agent and attorney for us in our name and stead and for our sole use and benefit to file the same with the register of said land office, to make or to procure to be made, all necessary affidavits and proofs at any time required, to file the same in said land office; to make entry of and payment for said land in our names, to do all and singular the acts and things requisite, lawful, and proper to be done in the premises, especially to make the nonmineral affidavit required, as we are assured and believe that he is well acquainted with the character to each and every subdivision of said described land;
70 and to procure for us from the United States the receipt and patent for said lands, as fully and completely as we might or could do, with full power to substitute one or more agents or attorneys for the purposes aforesaid and to revoke any such appointment, ratifying and confirming all that our said agent and attorney or his substitute may lawfully do in the premises.

In witness whereof we have hereunto set our hands and seals this 15th day of July, A. D. 1905.

RICHARD E. MORRIS.
WM. P. LIGHTHOLDER.

Signed in the presence of—

STATE OF MISSOURI,
City of St. Louis, ss:

On the 15th day of July, A. D. 1905, at my office at St. Louis, Mo., before me, Wm. Baer, a notary public in and for the city and State aforesaid, personally appeared Richard E. Morris and Wm. P. Lightholder, known to me to be the same persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first written.

WM. BAER, *Notary Public.*

My commission expires 3/30, 1907.
Wm. Baer, notary public, city of St. Louis, Mo.

71 That at the time of presenting and causing to be presented and filing and causing to be filed, as aforesaid, said power of attorney, the said defendants then and there well knew that said power of attorney was false, fictitious, feigned, illegal, forged, and fraudulent in this, to wit, that the said William P. Lightholder did not then and there appoint the said Arie Keitel his true and lawful agent and attorney for his sole use and benefit to file said papers and make said entry with the register and receiver of the said land

office at Glenwood Springs aforesaid, and to make payment for said land in said entry for him, the said William P. Lightholder; and said power of attorney was further false in stating that said William P. Lightholder had been assured that said Arie Keitel was well acquainted with the character of each and every subdivision of said land, but in truth and in fact he, the said William P. Lightholder, made said entry and power of attorney in collusion with and for the use and benefit of the said defendants and said corporation, and the said Arie Keitel was in truth and in fact to make payment of the purchase price of said lands for the said defendants and the said corporation to the receiver of said land office, and that the said William P. Lightholder did not know nor was he acquainted with the said Arie Keitel at the time of making said entry and
72 power of attorney, and was not then and there informed that the said Arie Keitel knew anything whatever about said land, and that said power of attorney was further then and there false, fictitious, illegal, feigned, forged, and fraudulent in this, that the said William P. Lightholder never subscribed and made oath to the said power of attorney on the 15th day of July, 1905, or at any other time, before William Baer, notary public, and that the jurat and certificate of said William Baer, notary public, in said power of attorney following the signature of the said William P. Lightholder was then and there wholly false, fictitious, feigned, illegal, forged, and fraudulent, as aforesaid, and the said defendants having theretofore procured, hired, induced, and persuaded the said William P. Lightholder to subscribe his name to said false, fictitious, feigned, illegal, forged, and fraudulent papers and power of attorney in said coal-land entry in collusion with the defendants, and to defraud the United States out of the title to and the use and benefit of said coal lands.

(7) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of same, the said F. W. Keitel and Arie Keitel, afterwards, to wit, on the twenty-sixth day of July,
73 in the year of our Lord one thousand nine hundred and six, in the county of Garfield, in the district of Colorado, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application to purchase, in coal cash entry number 3599, of one Joseph Schindler, for the following-described coal lands of the United States, to wit, the northeast quarter of the southwest quarter and the east half of the northwest quarter section thirty-two, and the east half of the southwest quarter and the east half of the northwest quarter section twenty-nine, in township six

north, of range eighty-seven west of the sixth principal meridian, in Colorado, which said power of attorney was and is in the following words and figures, to wit:

Power of attorney—Coal lands.

Know all men by these presents that we, R. W. Brehme and Joe Schindler, the city of St. Louis and State of Missouri, having under the provisions of the Revised Statutes of the United
74 States relating to the sale of coal lands, made application to purchase the NW. ¼ of SW. ¼ and E. ½ of NW. ¼ of sec. 32, and E. ½ of SW. ¼ and E. ½ of NW. ¼ of sec. 29, in township 6 north, of range 87 west of the 6th principal meridian, in the district of lands subject to sale at the land office at Glenwood Springs, Colorado, do hereby constitute and appoint Arie Keitel, of Hayden, Colorado, our true and lawful agent and attorney for us in our name and stead and for our sole use and benefit to file the same with the register of said land office, to make or to procure to be made all necessary affidavits and proofs at any time required, and to file the same in said land office, to make entry of and payment for said land in our names, to do all and singular the acts and things requisite, lawful, and proper to be done in the premises, especially to make the nonmineral affidavit required, as we are assured and believe that he is well acquainted with the character of each and every subdivision of said described land, and to procure for us from the United States the receipt and patent for said lands, as fully and completely as we might or could do, with full power to substitute one or more agents or attorneys for the purposes aforesaid, and to revoke any such appointment, hereby ratifying and confirming all that our said agent and attorney or his substitute may lawfully do in the premises.

75 In witness whereof we have hereunto set our hands and seals this 30th day of June, A. D. 1806.

A. M. Brehme,
1119 Wyoming st.
Joe. Schindler,
3001 Park ave.

Signed in presence of—

State of Missouri,
City of St. Louis, ss:

On this 30th day of June, A. D. 1906, at my office at St. Louis, before me, Wm. Baer, a notary public in and for the city and State aforesaid, personally appeared Joe Schindler and A. M. Brehme, known to me to be the same persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first written.

Wm. Baer, *Notary Public.*

My commission expires 3/30/1907.
Wm. Baer, notary public, city of St. Louis, Mo.

That at the time of presenting and causing to be presented and filing and causing to be filed, as aforesaid, said power of attorney, the said defendants then and there well knew that said power of attorney was false, fictitious, feigned, illegal, forged, and
76 fraudulent in this, to wit, that the said Joseph Schindler did not then and there appoint the said Arie Keitel his true and lawful agent and attorney for his sole use and benefit to file said papers and make said entry with the register and receiver of the said land office at Glenwood Springs aforesaid, and to make payment for said land in said entry for him, the said Joseph Schindler; and said power of attorney was further false in stating that said Joseph Schindler had been assured that said Arie Keitel was well acquainted with the character of each and every subdivision of said land, but in truth and in fact he, the said Joseph Schindler, made said entry and signed said power of attorney in collusion with and for the use and benefit of the said defendants and said corporation, and the said Arie Keitel was in truth and in fact to make payment of the purchase price of said lands for the said defendants and the said corporation to the receiver of said land office, and that the said Joseph Schindler did not know nor was he acquainted with the said Arie Keitel at the time of making said entry and power of attorney, and was not then and there informed that said Arie Keitel knew anything whatever about said land, and that said power of attorney was further then and there false, fictitious, illegal, feigned, forged, and fraudulent in this, that the said Joseph Schindler never
77 subscribed and made oath to the said power of attorney on the 30th day of June, 1906, or at any other time, before Wm. Baer, notary public, and that the jurat and certificate of said William Baer, notary public, following the signature of the said Joseph Schindler in said power of attorney was then and there wholly false, fictitious, illegal, feigned, forged, and fradulent, as aforesaid, the said defendants having theretofore procured, hired, induced, and persuaded the said Joseph Schindler to subscribe his name to the said false, fictitious, feigned, illegal, forged, and fraudulent papers and power of attorney in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said lands.

(8) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the same F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-sixth day of July, in the year of our Lord one thousand nine hundred and six, in the county of Garfield, in the district of Colorado, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood
78 Springs in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fradulent papers and filings, to

wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavit, and application to purchase in coal cash entry number 3604 of one Fred Schindler, for the following-described coal lands of the United States, to wit, the northwest quarter of the southeast quarter and the west half of the northeast quarter of section thirty-two, and the west half of the southeast quarter and the west half of the northeast quarter of section twenty-nine, in township six north, of range eighty-seven west of the sixth principal meridian, in Colorado, which said power of attorney was and is in the following words and figures, to wit:

Power of attorney—Coal lands.

Know all men by these presents that we, Fred Schindler and Teresa Schindler, of the city of St. Louis, and State of Colorado, having, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands, made application to purchase the NW. ¼ of SE. ¼ and W. ½ of NE. ¼ of sec. 32, and W. ½ of SE. ¼ and W. ½ of NE. ¼ of sec. 29, in township 6 north, of range 87 west of the 6th principal meridian, in the district of lands subject to sale at the land office at Glenwood Springs, Colorado, do
79 hereby constitute and appoint Arie Keitel, of Hayden, Colorado, our true and lawful agent and attorney for us in our name and stead and for our sole use and benefit to file the same with the register of said land office, to make or to procure to be made, all necessary affidavits and proofs at any time required, and to file the same in said land office; to make entry of and payment for said land in our names, to do all and singular the acts and things requisite, lawful, and proper to be done in the premises, especially to make the nonmineral affidavit required, as we are assured and believe that he is well acquainted with the character of each and every subdivision of said described land, and to procure for us from the United States the receipt and patent for said lands, as fully and completely as we might or could do, with full power to substitute one or more agents or attorneys for the purposes aforesaid and to revoke any such appointment, hereby ratifying and confirming all that our said agent and attorney or his substitute may lawfully do in the premises.

In witness whereof we have hereunto set our hands and seals this 30th day of June, A. D. 1906.

FRED SCHINDLER,
80 TERESA SCHINDLER.

Signed in the presence of—

STATE OF MISSOURI,
City of St. Louis, ss.:

On the 30th day of June, A. D. 1906, at my office at St. Louis, Mo., before me, Wm. Baer, a notary public in and for the city and State aforesaid, personally appeared Fred Schindler and Teresa Schindler,

known to me to be the same persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first written.

WM. BAER, *Notary Public.*

My commission expires March 30, 1907.

Wm. Baer, notary public, city of St. Louis, Mo.

That at the time of presenting and causing to be presented and filing and causing to be filed, as aforesaid, said power of attorney, the said defendants then and there well knew that said power of attorney was false, fictitious, feigned, illegal, forged, and fraudulent in this, to wit, that the said Fred Schindler did not then and there appoint the said Arie Keitel his true and lawful agent and attorney for his sole use and benefit to file said papers and make said entry with the register and receiver of the said land office at Glenwood Springs aforesaid, and to make payment for said land in said entry for him, the said Fred Schindler; and said power of attorney
81 was further false in stating that said Fred Schindler had been assured that said Arie Keitel was well acquainted with the character of each and every subdivision of said land, but in truth and in fact he, the said Fred Schindler, made said entry and signed said power of attorney in collusion with and for the use and benefit of the said defendants and said corporation, and the said Arie Keitel was in truth and in fact to make payment of the purchase price of said lands for the said defendants and the said corporation to the receiver of said land office, and that the said Fred Schindler did not know nor was he acquainted with the said Arie Keitel at the time of making said entry and power of attorney, and was not then and there informed that said Arie Keitel knew anything whatever about said land, and that said power of attorney was further then and there false, fictitious, illegal, feigned, forged, and fraudulent in this, that the said Fred Schindler never subscribed and made oath to the said power of attorney on the 30th day of June, 1904, or at any other time, before William Baer, notary public, and that the jurat and certificate of said William Baer, notary public, following the signature of the said Fred Schindler in said power of attorney was then and there wholly false, fictitious, feigned, illegal, forged, and fraudulent, as aforesaid, the said defendants having theretofore procured, hired, induced, and persuaded the said Fred Schindler to subscribe his name to the said false, fictitious,
82 feigned, illegal, forged, and fraudulent papers and power of attorney in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(9) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of said unlawful

conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the twenty-sixth day of July, in the year of our Lord one thousand nine hundred and six, in the county of Garfield, in the district of Colorado, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavit, and application to purchase in coal entry number 3600 of one W. D. Schindler, whose first real and true name is to the grand jurors unknown, for the following-described coal lands of the United States, to wit, the west half of the southwest quarter and
the west half of the northwest quarter, section thirty-two, and
83 the west half of the southwest quarter and the west half of the
northwest quarter of section twenty-nine, in township six north, of range eighty-seven west of the sixth principal meridian, in Colorado, which said power of attorney was and is in the following words and figures, to wit:

Power of attorney—Coal lands.

Know all men by these presents that we, E. T. Potter and W. D. Schindler, of the city of St. Louis and State of Missouri, having, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands, made application to purchase the west half of SW. ¼ and W. ½ of NW. ¼ of sec. 32, and W. ½ of SW. ¼ and W. ½ of NW. ¼ of sec. 29, in township 6 north, of range 87 west of the 6th principal meridian, in the district of lands subject to sale at the land office at Glenwood Springs, Colorado, do hereby constitute and appoint Arie Keitel, of Hayden, Colorado, our true and lawful agent and attorney for us in our name and stead and for our sole use and benefit to file the same with the register of said land office, to make or to procure to be made, all necessary affidavits and proofs at any time required, and to file the same in said land office, to make entry of any payment for said land in our names, to do all and singular the acts and things requisite, lawful, and proper to be done in the premises, especially to make the nonmineral affidavit
required, as we are assured and believe that he is well ac-
84 quainted with the character of each and every subdivision
of said described land, and to procure for us from the United States the receipt and patent for said lands, as fully and completely as we might or could do, with full power to substitute one or more agents or attorneys for the purposes aforesaid, and to revoke any such appointment, hereby ratifying and confirming all that our said agent and attorney or his substitute may lawfully do in the premises.

In witness whereof we have hereunto set our hands and seals this 30th day of June, A. D. 1904.

E. T. POTTER.
W. D. SCHINDLER.

Signed in the presence of—

STATE OF MISSOURI,
City of St. Louis, ss:

On the 30th day of June, A. D. 1907, at my office at St. Louis, before me, Wm. Baer, a notary public in and for the city and State aforesaid, personally appeared E. T. Potter and W. D. Schindler, known to me to be the same persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first written.

WM. BAER, *Notary Public.*

85 My commission expires 3/30/1907.
Wm. Baer, notary public, city of St. Louis, Mo.

That at the time of presenting and causing to be presented and filing and causing to be filed, as aforesaid, said power of attorney, the said defendants then and there well knew that said power of attorney was false, fictitious, feigned, illegal, forged, and fraudulent in this, to wit, that the said W. D. Schindler did not then and there appoint the said Arie Keitel his true and lawful agent and attorney for his sole use and benefit to file said papers and make said entry with the register and receiver of the said land office at Glenwood Springs aforesaid, and to make payment for said land in said entry for him the said W. D. Schindler, and said power of attorney was further false in stating that the said W. D. Schindler had been assured that said Arie Keitel was well acquainted with the character of each and every subdivision of said land, but in truth and in fact he, the said W. D. Schindler, made said entry and signed said power of attorney in collusion with and for the use and benefit of the said defendants, and said corporation, and the said Arie Keitel was in truth and in fact to make payment of the purchase price of said land for the said defendants and said corporation to the receiver of said land office; and that the said W. D. Schindler did not know nor was he acquainted with the said Arie Keitel at the time of making said entry and power of attorney, and was not then and there informed that said Arie
86 Keitel knew anything whatever about said land, and that said power of attorney was further then and there false, fictitious, illegal, feigned, forged, and fraudulent in this, that the said W. D. Schindler never subscribed his name and made oath to the said power of attorney on the 30th day of June, 1904, or at any other time, before William Baer, notary public, and that the jurat and certificate of said William Baer, notary public, following the signature of the

said W. D. Schindler in said power of attorney was then and there wholly false, fictitious, feigned, illegal, forged, and fraudulent, as aforesaid, the said defendants having theretofore procured, hired, induced, and persuaded the said W. D. Schindler to subscribe his name to the said false, fictitious, feigned, illegal, forged, and fraudulent papers and power of attorney in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

(10) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel, afterwards, to wit, on the twenty-sixth day of July, in the year of our Lord one thousand nine hundred and six, in the county of Garfield, district of Colorado, did then and there unlawfully, willfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the
87 register and receiver of the United States land office at Glenwood Springs, in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application to purchase in coal entry number 3601 of one Joseph Schulte for the following-described coal lands of the United States, to wit, the southwest quarter, the west half of the southeast quarter, the northeast quarter of the southeast quarter, and the southeast quarter of the northeast quarter, all in section nineteen, township six north, of range eighty-seven west, of the sixth principal meridian, in Colorado, which said power of attorney was and is in the following words and figures, to wit:

Power of attorney—Coal lands.

Know all men by these presents that we, Joseph Schulte and Henry Stempel, of the city of St. Louis and State of Missouri, having, under the provisions of the Revised Statutes of the United States relative to the sale of coal lands, made application to purchase the SW. ¼, the W. ½ of SE. ¼, the NE. ¼ of SE. ¼, and the SE. ¼ of NE. ¼, all in section 19, in township 6 north, of range 87 west, of the 6th principal meridian, in the district of lands subject to sale at the land office at Glenwood Springs, Colorado, do hereby constitute and appoint Arie Keitel, of Hayden, Colorado, our true and lawful agent and attorney for us in our name and stead and for our sole use and benefit to file the same with the register of said land office, to make or to procure to be made, all necessary affidavits and proofs at any time required, and to file the same in said land office, to make entry of and payment for said land in our names, to do all and singular the acts and things requisite, lawful, and proper to be done in the premises, es-
88 pecially to make the nonmineral affidavit required, as we are assured and believe that he is well acquainted with the char-

acter of each and every subdivision of said described land; and to procure for us from the United States the receipt and patent for said lands, as fully and completely as we might or could do, with full power to substitute one or more agents or attorneys for the purposes aforesaid and to revoke any such appointment, hereby ratifying and confirming all that our said agent and attorney or his substitute may lawfully do in the premises.

In witness whereof we have hereunto set our hands and seals this 30th day of June, A. D. 1906.

JOSEPH SCHULTE.

Signed in the presence of—
HENRY STEMPEL.

STATE OF MISSOURI,
City of St. Louis, ss:

On the 30th day of June, A. D. 1906, at my office at St. Louis Mo., before me Wm. Baer, a notary public in and for the city and State aforesaid, personally appeared Joe Schulte and Henry Stempel, known to me to be the same persons whose names are subscribed to the foregoing instrument, and acknowledged that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first written

WM. BAER, *Notary Public.*

My commission expires 3/30/1907.
Wm. Baer, notary public, city of St. Louis, Mo.

That at the time of presenting and causing to be presented and filing and causing to be filed, as aforesaid, said power of attorney, the said defendants then and there well knew that said power of attorney was false, fictitious, feigned, illegal, forged, and fraudulent in this, to wit, that the said Joseph Schulte did not then and
89 there appoint the said Arie Keitel his true and lawful agent and attorney for his sole use and benefit to file said papers and make said entry with the register and receiver of the said land office at Glenwood Springs aforesaid, and to make payment for said land in said entry for him, the said Joseph Schulte, and said power of attorney was further false in stating that said Joseph Schulte had been assured that said Arie Keitel was well acquainted with the character of each and every subdivision of said land, but in truth and in fact he, the said Joseph Schulte, made said entry and signed said power of attorney in collusion with and for the use and benefit of the said defendants, and the said corporation, and the said Arie Keitel was in truth and in fact to make payment of the purchase price of said lands for the said defendants and the said corporation to the receiver of said land office, and that the said Joseph Schulte did not know nor was he acquainted with the said Arie Keitel at the time of making said entry and power of attorney, and was not then and there in-

formed that said Arie Keitel knew anything whatever about said land, and that said power of attorney was further then and there false, fictitious, illegal, feigned, forged, and fraudulent, in this, that the said Joseph Schulte never subscribed and made oath to the said power of attorney on the 30th day of June, 1906, or at any other time, before William Baer, notary public, and that the jurat and
90 certificate of said William Baer, notary public following the signature of the said Joseph Schulte in said power of attorney was then and there wholly false, fictitious, feigned, illegal, forged, and fraudulent, as aforesaid, the said defendants having theretofore procured, hired, induced, and persuaded the said Joseph Schulte to subscribe his name to the said false, fictitious, feigned, illegal, forged, and fraudulent papers and power of attorney in said coal-land entry in collusion with the defendants and to defraud the United States out of the title to and the use and benefit of said coal lands.

11. And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel, afterwards, to wit, on the eighteenth day of July, in the year of our Lord one thousand nine hundred and five, in the county of Garfield, in the district of Colorado, did then and there unlawfully, wilfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, coal declaratory statement, power of attorney, nonmineral affidavit, corroborating non-
mineral affidavit, in coal entry number 3196, of one Dan Kava-
91 nagh, for the following-described coal lands of the United States, to wit, the north half of the northeast quarter, the north half of the northwest quarter of section thirteen, and the north half of the northeast quarter and the north half of the northwest quarter section fourteen, in township nine north, of range eighty-eight west of the sixth principal meridian, in Colorado; that said coal declaratory statement and said power of attorney were never in fact signed, subscribed, and sworn to by the said Dan Kavanagh, and the name of Dan Kavanagh attached thereto is not in fact the signature of the said Dan Kavanagh, and the said certificate and jurat of the defendant William Baer, as notary public, attached to and made a part of said coal declaratory statement and said power of attorney, respectively, is false, forged, and fictitious, the defendants having theretofore procured the making of said false, fictitious, feigned, illegal, forged, and fraudulent papers, to wit, coal declaratory statement and power of attorney, with the intention of defrauding the United States out of the title to and the use and benefit of said coal lands.

(12) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the first day of August, in the year of our Lord one thousand nine hundred and five, in the
92 county of Garfield, in the district of Colorado, did then and there unlawfully, wilfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, coal declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavit, in coal cash entry number 3231, of one W. Biedmann, first real and true name to the grand jurors unknown, for the following described coal lands of the United States, to wit, the west half of section thirty-one, in township nine north, of range eighty-seven west of the sixth principal meridian, in Colorado; that said coal declaratory statement and said power of attorney were never in fact signed, subscribed, and sworn to by the said W. Biedemann, and the name W. Biedemann attached thereto is not in fact the signature of the said W. Biedemann, and the said certificate and jurat of the defendant William Baer, as a notary public, attached to and made a part of said coal declaratory statement, and said power of attorney, respectively, is false, forged, and fictitious; the defendants having theretofore procured the making of said false, fictitious, feigned, illegal, forged, and fraudulent papers, to wit, coal declaratory statement and power of attorney, with the intention of defrauding the United States out of the title to and the possession and benefit of said coal lands.

93 (13) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel, afterwards, to wit, on the sixteenth day of October, in the year of our Lord one thousand nine hundred and five, in the county of Garfield, in the district of Colorado, did then and there unlawfully, wilfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, coal declaratory statement, power of attorney, nonmineral affidavit, and corroborating nonmineral affidavit, in coal entry number 3294, of one John Ash, for the following-described coal lands of the United States, to wit, the east half of the northwest quarter, the east half of the southwest quarter of section five, and the east half of the northwest quarter and the east half of the southwest quarter of section 8, in township nine north, of range eighty-seven west, of the

sixth principal meridian, in Colorado; that said coal declaratory statement and said power of attorney were never in fact signed, subscribed, and sworn to by the said John Ash, and the name John Ash attached thereto is not in fact the signature of the said John Ash, and the said certificate and jurat of the defendant
94 William Baer as notary public attached to and made a part of said coal declaratory statement and said power of attorney, respectively, is false, forged, and fictitious, the defendants having theretofore procured the making of said false, fictitious, feigned, illegal, forged, and fraudulent papers, to wit, coal declaratory statement and power of attorney with the intention of defrauding the United States out of the title to and the possession and benefit of said coal lands.

(14) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie Keitel afterwards, to wit, on the sixteenth day of October, in the year of our Lord one thousand nine hundred and five, in the county of Garfield, in the district of Colorado, did then and there unlawfully, wilfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, coal declaratory statement, power of attorney, nonmineral affidavit, and corroborating nonmineral affidavit, in coal cash entry number 3293 of one Joseph Daily, for the following-described coal lands of the United States, to wit, the west half of the northwest quarter,
95 the west half of the southwest quarter of section five, and the west half of the northwest quarter and the west half of the southwest quarter of section eight, in township nine north, of range eighty-seven west, of the sixth principal meridian, in Colorado; that said coal declaratory statement and said power of attorney were never in fact signed, subscribed, and sworn to by the said Joseph Daily, and the name Joseph Daily attached thereto is not in fact the signature of the said Joseph Daily, and the certificate and jurat of the defendant William Baer, as notary public attached to and made a part of said coal declaratory statement and said power of attorney, respectively, is false, forged, and fictitious; the defendants theretofore having procured the making of said false, fictitious, feigned, illegal, forged, and fraudulent papers, to wit, coal declaratory statement and power of attorney, with the intention of defrauding the United States out of the title to and the use and benefit of said coal lands.

(15) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said F. W. Keitel and Arie

Keitel afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and four, in the county of Garfield, in the district of Colorado, did then and
96 there unlawfully, wilfully, corruptly, wickedly, and knowingly present and cause to be presented and file and cause to be filed with the register and receiver of the United States land office at Glenwood Springs, in the district of Colorado, certain false, fictitious, feigned, illegal, forged, and fraudulent papers and filings, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application to purchase in coal cash entry number 274 of one Kate M. Caplinger for the following-described coal lands of the United States, to wit, the south half of the northwest quarter section twenty-four in township eight north, of range eighty-seven west, of the sixth principal meridian, in Colorado; that said power of attorney was never in fact signed, subscribed, and sworn to by the said Kate M. Caplinger, and the name Kate M. Caplinger attached thereto is not in fact the signature of the said Kate M. Caplinger, and the certificate and jurat of the defendant William Baer as notary public, attached to and made a part of said power of attorney, is false, forged, fictitious, and untrue, the defendants having theretofore procured the making of said false, fictitious, feigned, illegal, forged, and fraudulent power of attorney with the intention of defrauding the United States out of the title to and the use and possession of said coal lands.

(16) And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that, further in pursuance of said
97 unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said defendants afterwards, to wit, on the twenty-first day of January, in the year of our Lord one thousand nine hundred and five, in the county of Garfield, in the district of Colorado, did then and there unlawfully, wilfully, corruptly, wickedly, and knowingly present and cause to be presented and filed and caused to be filed with the register and receiver of the United States land office at Glenwood Springs, in the district of Colorado, a certain false, fictitious, feigned, illegal, forged, and fraudulent affidavit and paper and writing purporting to be such in coal cash entry number 274, of one Kate M. Caplinger, for the following-described lands of the United States, to wit, the south half of the northwest quarter of section twenty-four, township eight north, of range eighty-seven west, of the sixth principal meridian, in Colorado, and which said false, fictitious, feigned, illegal, forged, and fraudulent affidavit and writing and paper purporting to be such, was and is in the words and figures following, to wit:

STATE OF MISSOURI,
City of St. Louis, ss:

Kate M. Caplinger, being first duly sworn, on oath deposes and says that she is a resident of the city of St. Louis, State of Missouri,

and is over the age of twenty-one years, and a native-born citizen; that she did, on the seventeenth day of May, A. D. 1904, make application to purchase at private entry the following-described coal lands, subject to sale, at the land office of Glenwood Springs, Colo., to wit, south half of the northwest quarter of section
98 twenty-four (24), township eight (8) north, of range eighty-seven west, of the sixth principal meridian, in Colorado; that she is an unmarried woman and that the money used in payment for this land is her own individual money, and that the land sought is for her sole use and benefit and bought for the use of no other person whomsoever.

KATE M. CAPLINGER.

Subscribed and sworn to before me this 10th day of January, A. D. 1905, at my office at St. Louis, Missouri.

WM. BAER, *Notary Public.*

Wm. Baer, notary public, city of St. Louis, Mo.

Which said affidavit and paper and writing purporting to be such was then and there false, fictitious, feigned, illegal, forged, and fraudulent in this, that the money used in payment for the land described in said coal cash entry was not in fact the money of Kate M. Caplinger, but the money and property of the said defendants and the said corporation, and that the land sought to be entered was not for the sole use and benefit of the said Kate M. Caplinger and bought by her for the use and benefit of no other person whomsoever, but was bought for the use and benefit of the defendants and the said corporation and in collusion with said defendants and said corporation for the purpose and with the intent of transferring the title to the said defendants and said corporation; that said affidavit was then and there on the said 21st day of January, 1905, further false, fictitious, feigned, illegal, forged, and fraudulent in this, that the said Kate M. Caplinger never in fact signed the aforesaid affidavit or authorized anyone to sign the same for
99 her, and that the name Kate M. Caplinger subscribed to said false, fictitious, forged, feigned, illegal, and fraudulent affidavit is not in fact the signature of the said Kate M. Caplinger; and that said affidavit was then and there further false, fictitious, feigned, illegal, forged, and fraudulent in this, that the certificate and jurat of the notary public, William Baer, attached to and made a part of said affidavit, following the name Kate M. Caplinger, is false, fictitious, forged, and fraudulent in this, that the said Kate M. Caplinger never in fact appeared before the defendant William Baer, as such notary public, and subscribed said paper, or subscribed the same at any time, nor never made oath to the same on the tenth day of January, 1905, or at any other time; all of which the defendants then and there well knew at the time of the presenting and causing to be presented and filing and causing to be filed of said affidavit as aforesaid.

Contrary to the form, force, and effect of the statute of the United States of America in such case made and provided, and against the peace and dignity of the said United States.

EARL M. CRANSTON,
United States Attorney.
S. R. RUSH,
Special Assistant to the Attorney-General.

(Endorsed:) No. 2022. Doc. United States District Court, District of Colorado. United States of America vs. F. W. Keitel,
100 Arie Keitel, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck. Indictment: Conspiracy, sec. 5440 R. S. U. S. A true bill: E. D. Welker, foreman. Filed June 10, 1907. Charles W. Bishop, clerk.

Thirty-ninth day, May term, Saturday, June 22nd, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the seventh day of May, A. D. 1907.

The UNITED STATES OF AMERICA *vs.* F. W. KEITEL, ARIE KEITEL, FRANK P. FAY, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck.	2022. *Indictment for conspiracy.*

At this day comes Earl M. Cranston, esquire, district attorney, who prosecutes the pleas of the United States in this behalf. And thereupon, on his motion,

It is ordered by the court that the defendants give bond before an United States commissioner for their appearance in this court
101 from day to day and from term to term to answer unto the indictment herein as follows, to wit: F. W. Keitel in the sum of five thousand dollars ($5,000), Arie Keitel in the sum of five thousand dollars ($5,000), Frank P. Fay in the sum of five thousand dollars ($5,000), Lewis M. Rumsey in the sum of five thousand dollars ($5,000), William Baer in the sum of three thousand dollars ($3,000), Walter S. Price in the sum of three thousand dollars ($3,000), Charles H. Dodge in the sum of two thousand dollars ($2,000), Anna Dodge in the sum of two thousand dollars ($2,000), Charles F. W. Haberbeck in the sum of two thousand dollars ($2,000), Magdalena Haberbeck in the sum of two thousand dollars ($2,000), and Gus Haberbeck in the sum of two thousand dollars ($2,000).

United States of America, in the District Court of the United States for the District of Colorado.

UNITED STATES
vs.
F. W. KEITEL ET AL.

Now comes Lewis M. Rumsey, one of the defendants in the indictment in this case, and files this, his motion to quash the said indictment and each count thereof, for the reason that said indictment, and each count thereof is defective in law and not sufficient in law to be pleaded to by this defendant, on the following grounds:

102 The first count of the indictment is wholly insufficient in law to require any plea from this defendant in the following particulars:

First. It does not charge this defendant with any crime against or under the laws of the United States.

Second. It is bad for duplicity for the following reasons:

(a) The first charge attempted to be alleged in the first portion of said first count is that this defendant, with his codefendants, "did then and there unlawfully, willfully, corruptly, wickedly and knowingly conspire, combine, confederate, and agree with others named in the indictment to make false, fictitious, feigned, illegal, forged, and fraudulent entries and filings."

(b) The second charge attempted to be alleged in the following portion of said first count is that the defendant, with his said codefendants, "did then and there unlawfully, willfully, corruptly, wickedly, and knowingly conspire, combine, confederate and agree," with the same persons, "to induce, persuade, procure, and hire divers other persons, hereinafter called entrymen, named in overt acts numbers one to twenty-four, both inclusive, to make false, fictitious, illegal, feigned, forged, and fraudulent entries and declaratory statements and applications."

103 (c) The third charge attempted to be alleged in next succeeding portion of said first count of said indictment, is a conspiracy between defendant, his codefendants, and the same third parties, "to enter powers of attorney, nonmineral affidavits, and affidavits to purchase in said entries at the land office of the United States at Glenwood Springs, county of Garfield, and State of Colorado, of certain tracts of coal lands of the United States, described in the overt acts of the indictment."

(d) The fourth charge attempted to be alleged in the next succeeding portion of said first count of said indictment is that said defendant and his said coconspirators, "at and in the making of such false, fictitious, feigned, illegal, forged and fraudulent entries, declaratory statements, applications to enter and powers of attorney, nonmineral affidavits, and affidavits to purchase in said entries, to make respective statements of fact to the register and receiver of the

said land office, which would be known by the said defendants, agents, and entrymen to be false, fraudulent, forged, and untrue, and thereby wrongfully, unlawfully, fraudulently, and deceitfully caused the register and receiver, and also the Commissioner of the General Land Office of the United States to act, respectively, in administering said laws and regulations in that behalf made in pursuance of law, otherwise than they would or lawfully could have acted were they aware of such falsity, forgery, and misrepresentation in the said representations, statements, matters, and entries above referred to; that is to say, cause the said register and receiver and Commissioner of the General Land Office to accept such false, fictitious, feigned, illegal, forged, and fraudulent entries and filings hereinabove specified, from said defendants, agents and entrymen, etc."

104 (e) The fourth charge attempted to be set forth in said first count of the indictment in the next succeeding portion thereof is that it was the "intention and design of the said defendants to combine, conspire, and agree as aforesaid with their said agents and divers other persons to the grand jurors unknown, to furnish said entrymen with monies necessary to make payment to the receiver of the said land office of the price fixed by law for the said lands, and thereupon to require and receive conveyances from said entrymen and agents to be made to themselves, said defendants and the Yampa Anthracite Coal Co., a corporation, of the title to the said lands as hereinafter more particularly set forth."

(f) The sixth charge attempted to be set forth in the said first count of said indictment in the portion thereof immediately succeeding the foregoing is that "the said defendants unlawfully, corruptly, wilfully, and knowingly did conspire, combine, confederate, and agree together with their said agents and said divers other persons to the grand jurors unknown, by means of said fictitious, illegal, feigned, untrue, forged, and fraudulent entries and filings hereinbefore referred to, indirectly, deceitfully, and fraudulently to obtain for themselves and the said corporation from the said United States, certain of the public lands and property of the said United States above referred to in quantity greatly in excess of that which either or any or all of the said defendants and said corporation would lawfully be allowed to obtain directly from the United States under a lawful administration of the said laws and regulations, and by means of legal and valid entries of said lands, and in that manner to deprive the said United States of its valuable property in such lands."

105 (g) The seventh charge, attempted to be alleged in said first count of said indictment in the portion immediately following the portion last hereinbefore referred to, is a charge that by means of the alleged false, fictitious, illegal, feigned, untrue, forged, and fraudulent entries and filings, this defendant with the said co-defendants and others attempted to defraud the United States "of its governmental function in the matter of preserving and disposing of the said lands, as well as of its right to administer an intelligent

and honest service in that behalf in the interest of the people of the United States."

(h) The eighth charge attempted to be alleged in said first count is that the said defendants directly and through their said agents, by persuasion, promise, solicitation, and payment of reward to said entrymen and agents of some small sum of money, the amount whereof is to the grand jury unknown, induced, procured, and hired the said entrymen and agents to make false, fictitious, feigned, illegal, forged, and fraudulent enteries of the said coal lands and filings hereinbefore referred to at the said land office with the said register and receiver in the quantities allowed by law, in pursuance of said conspiracy, whereunder the said entrymen and agents and defendants were severally falsely and fraudulently to execute and furnish to said register and receiver all the necessary papers,
106 declarations, filings above specified, falsely purporting to be under oath in said false, fictitious, illegal, feigned, forged, and fraudulent entries, and furthermore that such statements, representations, affidavits, and filings would not be made under oath and subscribed and sworn to before any officer competent to administer an oath, and the jurat attached thereto, respectively, would be false, fictitious, feigned, forged, fraudulent, and illegal, and that the entrymen would, by means of such false, fictitious, illegal, feigned, forged, and fraudulent entries obtain from the United States its title to said lands.

(i) Because in each of the attempted charges hereinbefore referred to under subdivisions (a), (b), (c), (d), (e), (f), (g), and (h) of this motion, there are included allegations that the entries filings, declaratory statements, powers of attorney, nonmineral affidavits, and affidavits to purchase and jurat therein referred to were each of them false, fictitious, feigned, illegal, forged, and fraudulent, and it is nowhere alleged in any of said paragraphs, wherein said alleged conspiracy is charged, which of the said papers, by and through which the objects of said conspiracy were to be effected, were false, which were fictitious, which were illegal, which were feigned, which were forged, and which were fraudulent, or in what respect any of said defects existed.

107 (j) The said indictment fails to show any venue or to allege with any certainty whereto this defendant can plead, as to the place where the alleged conspiracy was formed. It is alleged in said indictment that said conspiracy was made in the county of Garfield, in the county of Routt, and in the county of Denver, but it does not specify as to which of said three counties was the place wherein the alleged corrupt agreement, to which this defendant is charged to be a party, was formed, and defendant has no means of meeting said charge.

(k) The said first count is wholly defective, uncertain, and bad for duplicity in its failure to distinguish the alleged conspiracy and the objects embraced in the alleged corrupt agreement as proposed to be done thereunder from the alleged overt acts which are set up

in specifications one to twenty-four, which are charged as the overt acts done under said allege' corrupt conspiracy.

(l) The said first count is also bad for duplicity in that it alleges that it was a part of said corrupt agreement that the statements, representations, affidavits, and filings would not be made under oath, and subscribed to and sworn before any officer competent to administer an oath, and that the jurat attached thereto would be
108 false, forged, feigned, and fraudulent, and it does not appear whether such jurat would be false, or fictitious, or feigned, or forged, or fraudulent, nor as to what particular documents the jurat would be false, nor as to what document it would be forged, nor as to what document it would be fictitious, nor as to what document it would be fraud*ulent*, nor in what respect such document was subject to such defects; and said charge is wholly unmeaning and it is impossible for the defendant to plead thereto.

Third. The said first count is also uncertain, ambiguous, unintelligible, and vague in the following particulars:

(a) It can not be determined therefrom whether defendants are charged with inducing the filing of false, fraudulent, fictitious, feigned, illegal, or forged documents in respect to lands of the United States, or whether defendants are charged with conspiring to cause the register and receiver of the General Land Office to misconduct the governmental functions, or whether they are charged with a conpsiracy to defraud the Government of its possession of certain valuable lands.

(b) It can not be determined therefrom whether the conspiracy was formed to induce the execution of false papers or the execution of fictitious papers, or feigned papers, or illegal or forged
109 papers, or to execute fraudulent papers, or whether it was formed to hire and induce the filing of fictitious papers or illegal papers or fraudulent papers in the application for lands in the General Land Office, nor in what particular document or in what respect such defects exist.

(c) It can not be determined therefrom which of the several documents and papers therein referred to as included in said alleged unlawful agreement, were false, which were fraudulent, which were fictitious, which were feigned, which were illegal, or which were forged, or in what respect any of said documents were false, or fraudulent, or fictitious, or feigned, or illegal, or forged.

(d) It does not set forth the particular document which is claimed in said count was a part of said conspiracy and was forged, or false, or fraudulent, or fictitious, or feigned, or illegal.

(e) The said count is also ambiguous and uncertain and defective in that it does not state any acts of the conspirators or any of them by which the alleged conspiracy was formed.

(f) It is also ambiguous, uncertain, and defective in that it can not be determined from the allegations of said count whether the alleged conspiracy is claimed to be unlawful in the ends sought to be

attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

110 Fourth. So much of the first count of the said indictment as is taken up with specifications of alleged overt acts numbered 1 to 24, inclusive, is also bad for duplic'ty and ambiguity and uncertainty, in that the papers therein alleged to have been executed are described in said several specifications as false, fictitious, forged, feigned, fraudulent, and illegal without showing which of said papers was false, or which was fictitious, or which was feigned, or which was forged, or which was fraudulent, or which was illegal, or in what respect said papers were illegal or void, and this is the case with each and every one of said specifications of the said alleged overt acts numbered 1 to 24, inclusive, set forth in said first count of the indictment, and it does not appear from any one said specifications in what particular respect the certain overt acts therein referred to were illegal or criminal.

SECOND COUNT.

II. The said defendant further says that the second count of the said indictment is wholly insufficient in law to require any plea from this defendant in the following particulars:

First. It does not charge this defendant with any crime against or under the laws of the United States.

111 Second. The second count of the indictment is bad in that, in the body of the indictment, the district attorney has referred to section 4746, charging that the false, forged, and fictitious affidavits which were filed, and which were procured to be filed, were in violation of said section 4746, which said section is a pension statute and has reference only to the false affidavits filed or procured to be filed in reference to pension claims, or claim to bounty land, which is in the nature of a pension claim and can not be construed to apply to false and forged affidavits filed or procured to be filed to procure title to coal lands.

Third. The said second count is bad for duplicity for the following reasons:

(a) The first charge attempted to be alleged in the first portion of the said second count is that this defendant and his codefendants did then and there unlawfully, wilfully, corruptly, wickedly, and knowingly conspire, combine, confederate and agree with others named in the indictment to make and present false, fictitious, feigned, illegal, forged, and fraudulent papers and writings to the register and receiver of the land office in Glenwood Springs, in the district of Colorado.

(b) The second charge attempted to be alleged in the following portion of said second count of said indictment is

112 that the defendant, with his codefendants, did conspire to procure and induce, persuade, and hire divers other persons, hereinafter called entrymen and named by name as such in that

part of the indictment wherein overt acts were charged to have been committed by said defendants, being overt acts numbered one to sixteen, inclusive, to make, subscribe, present, and cause to be made, subscribed, and presented to the said register and receiver of the said land office at Glenwood Springs, in the county of Garfield, in the district of Colorado, said false, fictitious, feigned, forged, fraudulent, and illegal filings, declarations, affidavits, and certificates, respectively, and papers and writings purporting to be such.

(c) The next charge attempted to be alleged in said second count of said indictment is that the said defendant and his alleged coconspirators caused certain filings, declarations, affidavits, and papers, and certificates purporting to be such in the entry of lands which said defendant would well know to be false, fictitious, feigned, forged, fraudulent, and illegal, and contain false and fraudulent statements material to the matters aforesaid.

(d) The fourth charge attempted to be alleged in said second count of said indictment is that the said defendants directly
113 and through their said agents, by persuasion, promise, solicitation and payment of rewards to said entrymen and agents in some small sum, the amount whereof is to the grand jurors unknown, did induce, procure, and hire the said entrymen and agents to make false, fictitious, feigned, forged, fraudulent, and illegal entries and filings hereinbefore referred to at the said office of the register and receiver in the quantitities allowed by law, in pursuance of the said conspiracy, combination, and agreement between said defendants and their said agents, and the said entryman.

(e) The fifth charge attempted to be alleged is that the representations, affidavits, and filings in such entries so made by said entrymen would not be made under oath and subscribed to before any officer, and the jurat attached thereto would be false, fictitious, feigned, forged, fraudulent, and illegal; and that the said entrymen would, by means of such false, fictitious, feigned, forged, fraudulent, and illegal, and by payment to the said office of the price paid for such coal lands to obtain from the United States its title to said lands.

(f) Because in each of the attempted charges heretofore referred to under subdivisions (a), (b), (c), (d), and (e) of this motion there are included allegations that the entire filings, declarations, statements, powers of attorney, nonmineral affidavits, and jurats
114 therein referred to were each of them false, fictitious, feigned, forged, fraudulent, and illegal, and it is nowhere alleged in any of such paragraphs wherein said alleged conspiracy is charged as to the papers through which the objects of the said conspiracy were to be effected were false, which were fictitious, which were illegal, which were forged and which were fraudulent, or in what respects any of said defects existed as to each or any one of said papers.

(g) The said indictment fails to show any venue or to allege with any certainty whereto this defendant can plead, as to the place where the said alleged conspiracy was formed. It is alleged in said indictment that said conspiracy was formed in the county of Routt, in the

county of Garfield, and in the county of Denver, but it does not specify which of said three counties was the place wherein the alleged corrupt agreement, to which said defendant is charged to be a party, was formed, and the defendant has no means of meeting the said charge.

(h) The said second count is wholly defective, uncertain, and bad for duplicity in its failure to allege the said conspiracy and the objects embraced in the alleged corrupt agreement as proposed to be done thereunder from the alleged overt acts which are set up in specifications one to sixteen, which are charged to be the overt acts done under said alleged corrupt conspiracy.

115 (i) The said second count is also bad for duplicity in that it alleges that it was a part of said corrupt agreement that the statements, representations, affidavits, and filings would not be made under oath, and subscribed to and sworn to before any officer competent to administer an oath, and that the jurat attached thereto would be false, fictitious, feigned, forged, fraudulent, and illegal; and it does not appear whether such jurat would be false, whether it would be fictitious, or feigned, or forged, or fraudulent, or illegal, nor as to what particular document the jurat would be false, and as to what particular document it would be fictitious, nor as to what particular document it would be forged, nor as to what it would be feigned, nor as to what it would be fraudulent, nor as to what it would be illegal; and the said charge is wholly unmeaning, and it is impossible for this defendant to plead thereto.

Fourth. (a) The second count of the indictment is also ambiguous, unintelligible, and vague in this, that it can not be determined therefrom whether the conspiracy was formed to induce the execution of false papers of the execution of fictitious papers, or feigned papers, or illegal papers, or forged papers, or the execution of fraudulent papers, or whether it was formed to hire and induce

116 the filing of fictitious papers, or of feigned papers, or forged papers, or fraudulent papers, or illegal papers in the application for lands in the General Land Office.

(b) The said second count is also ambiguous, uncertain, unintelligible, and vague in this, that it can not be determined therefrom which of the several documents and papers therein referred to as included in said alleged unlawful agreement, were false, which were fraudulent, which were feigned, which were fictitious, which were forged, which were illegal, or in what respect any of said documents were false, or fictitious, or forged, or feigned, or fraudulent, or illegal.

(c) The second count of said indictment is further defective, uncertain, ambiguous, and unintelligible, in that it does not set forth the particular document which is claimed in said count was a part of said conspiracy and was forged, fictitious, false, fraudulent, and illegal.

(d) The said count is also ambiguous and uncertain and defective, in that it does not state any acts of the conspirators or any of them by which the alleged conspiracy was formed.

(e) It is also ambiguous, uncertain, and defective in that it can not be determined from the allegations of said count whether the alleged conspiracy is claimed to be unlawful in the ends sought
117 to be attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

Fifth. So much of the second count of the said indictment as is taken up with specifications of alleged overt acts numbered one to sixteen is also bad for duplicity and ambiguity and uncertainty in that the papers therein alleged to have been executed are described in said several specifications as false, fictitious, forged, feigned, fraudulent, and illegal, without showing which of said papers was false, which was fictitious, which was forged, which was feigned, which was fraudulent, or which was illegal, or in what respect said papers were void or illegal, and that is the case with each and every one of said specifications of the said alleged overt acts numbered one to sixteen, inclusive, set forth in said second count of the said indictment, and that it does not appear from any one of said specifications in what particular respect the certain overt acts therein referred to were illegal or criminal.

Sixth. The said indictment does not state facts sufficient to constitute a crime under the statutes of the United States or at all, in that the formation of a conspiracy to commit an offense against the United States or to defraud the United States is not sufficiently set forth or at all; the place and manner of forming the alleged conspiracy, or the place and manner in which, and at which the
118 conspiracy was entered into is not set forth at all in either count of said indictment.

Seventh. The indictment is at variance with the bench warrants in this, that the bench warrants charge a conspiracy to defraud the United States out of land, whereas the indictment alleges a conspiracy to induce, persuade, procure, and hire divers persons to make false, fictitious, feigned, forged, fraudulent, and illegal entries and filings in the land office, and to cause the register and receiver and Commissioner of the General Land Office to act respectively in administering the said laws and regulations of the United States otherwise than they would or could lawfully act.

Eighth. The indictment should be quashed for the further reason that the grand jurors by whom said indictment was made and presented was not regularly or legally summoned, empaneled, and sworn as required by the laws of the United States governing such procedure, in this, to wit:

At the May term of this court, on the 6th day of November, 1907, a grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the marshal of this court, was ordered to draw by chance from the jury box the names of 23 persons residents of the counties of Colorado named in said order, and to summon them to appear on
119 Tuesday, the 14th day of November, 1907, at 10 o'clock a. m., under a venire facias made returnable on that day; thereupon the names of twenty-three persons were drawn by the clerk, such

names being fully set forth in the records of this court at page 350. Thereafter, and on the 14th day of May, 1907, the United States marshal for the District of Colorado made return of the venire facias aforesaid, showing that thereunder he had summoned twenty-one men to serve as grand jurors; that the twenty-one individuals so summoned appeared on the return day aforesaid, and for good and sufficient reasons to the court appearing seven of said number were excused further attendance upon the court as grand jurors at that term, leaving less than sixteen, to wit, fourteen of the individuals originally summoned. Thereafter, upon these facts appearing to the court, a special venire facias was issued on said day commanding the marshal to summon seven good and lawful men to attend and serve as grand jurors until discharged, which said venire facias was made returnable on the 14th day of May, at 2 o'clock p. m.; that thereafter, the marshal of this court, under said special venire facias, without drawing further names from the box, summoned from the city and county of Denver seven men whose names appear at page 415 of the records of this court; that the summoning of the said seven individuals under the special venier facias was contrary 120 to law and the rules of this court; that the seven individuals so summoned appeared, were duly sworn and empaneled with the fourteen of the original panel, and the twenty-one individuals so summoned, empaneled, and sworn constituted the grand jury which returned the indictment herein.

Ninth. Said indictment is also fatally defective in failing to allege in either of said counts that the register and receiver of said land office was authorized in law to receive and allow the applications referred to and set forth in said counts.

FREDERICK N. JUDSON,
TYSON S. DINES,
Attorneys for defendant.
LEWIS M. RUMSEY.

(Endorsed:) 2022. In the District Court of the United States for the District of Colorado. The United States *vs.* F. W. Keitel et al. Motion of defendant Lewis M. Rumsey to quash said indictment. Filed Nov. 4, 1907, Charles W. Bishop, clerk. Frederick N. Judson, Tyson S. Dines, attys for Defendant Rumsey.

In the District Court of the United States for the District of Colorado.

UNITED STATES,
vs.
F. W. KEITEL ET AL.

Defendant Frank P. Fay's motion to quash the indictment herein.

121 Now comes Frank P. Fay, one of the defendants herein, and files this, his motion to quash the indictment against him in the above-entitled case, for the reason that said indictment, and each

count thereof, is defective in law and not sufficient in law to be pleaded to by this defendant, on the following grounds:

The first count of the indictment is wholly insufficient in law to require any plea from this defendant in the following particulars:

First. It does not charge this defendant with any crime against or under the laws of the United States.

Second. It is bad for duplicity for the following reasons:

(a) The first charge attempted to be alleged in the first portion of said first count is that this defendant, with his codefendants, "did then and there unlawfully, wilfully, corruptly, wickedly, and knowingly conspire, combine, confederate, and agree with others named in the indictment to make false, fictitious, feigned, illegal, forged, and fraudulent entries and filings."

(b) The second charge attempted to be alleged in the following portion of said first count is that the defendant, with his said
122 codefendants, "did then and there unlawfully, wilfully, corruptly, wickedly and knowingly conspire, combine, confederate, and agree," with the same persons, "to induce, persuade, procure, and hire divers other persons, hereinafter called entrymen, named in overt acts numbers one to twenty-four, both inclusive, to make false, fictitious, illegal, feigned, forged, and fraudulent entries and declaratory statements and applications."

(c) The third charge attempted to be alleged in the next succeeding portion of said first count of said indictment is a conspiracy between defendant, his codefendants, and the same third parties "to enter powers of attorney, nonmineral affidavits, and affidavits to purchase in said entries at the land office of the United States at Glenwood Springs, county of Garfield, and State of Colorado, of certain tracts of coal lands of the United States described in the overt acts of the indictment."

(d) The fourth charge attempted to be alleged in the next succeeding portion of said first count of said indictment is that said defendant and his said coconspirators, "at and in the making of such false, fictitious, feigned, illegal, forged, and fraudulent entries, declaratory statements, applications to enter, and powers of attorney, nonmineral affidavits, and affidavits to purchase in said entries, to make respective statements of fact to the register and receiver of the said land office, which would be known by the said defendants, agents, and entrymen to be false, fraudulent, forged, and untrue, and thereby wrongfully, unlawfully, fraudulently, and deceitfully cause the register and receiver, and also the Commissioner of the General
123 Land Office of the United States, to act, respectively, in administering said laws and regulations in that behalf made in pursuance of law otherwise than they would or lawfully could have acted were they aware of such falsity, forgery, and misrepresentation in the said representations, statements, matters, and entries above referred to; that is to say, to cause said register and receiver and Commissioner of the General Land Office to accept such false, fictitious, feigned, illegal, forged, and fraudulent entries and filings

hereinabove specified from said defendants, agents, and entrymen, etc."

(e) The fourth charge attempted to be set forth in said first count of the indictment in the next succeeding portion thereof is that it was the "intention and design of the said defendants to combine, conspire, and agree as aforesaid with their said agents and divers other persons to the grand jurors unknown to furnish said entrymen with monies necessary to make payment to the receiver of the said land office of the price fixed by law for the said lands, and thereupon to require and receive conveyances from said entrymen and agents to be made to themselves, said defendants, and the Yampa Anthracite Coal Co., a corporation, of the title to the said lands, as hereinafter more particularly set forth."

(f) The sixth charge attempted to be set forth in the said first count of said indictment in the portion thereof immediately succeeding the foregoing is that "the said defendants unlawfully, corruptly, wilfully, and knowingly did conspire, combine, confederate, and agree together with their said agents and divers other persons to the grand jurors unknown, by means of said fictitious, illegal, feigned, untrue, forged, and fraudulent entries and filings hereinbefore referred
124 to, indirectly, deceitfully, and fraudulently to obtain for themselves and the said corporation from the said United States certain of the public lands and property of the said United States above referred to in quantity greatly in excess of that which either or any or all of the said defendants and said corporation would lawfully be entitled to or allowed to obtain directly from the United States under a lawful administration of the said laws and regulations and by means of legal and valid entries of said lands, and in that manner deprive the said United States of its valuable property in such lands."

(g) The seventh charge attempted to be alleged in said first count of said indictment, in the portion immediately following the portion last hereinabove referred to, is a charge that by means of the alleged false, fictitious, illegal, feigned, untrue, forged, and fraudulent entries and filings this defendant, with the said codefendants and others, attempted to defraud the United States "of its governmental functions in the matter of preserving and disposing of the said lands, as well as of its right to administer an intelligent and honest service in that behalf in the interest of the people of the United States."

(h) The eighth charge attempted to be alleged in said first count of said indictment is that the said defendants directly and through their said agents, by persuasion, promise, solicitation, and payment of reward to said entrymen and agents of some small sum of money,
the amount whereof is to the grand jury unknown, induced,
125 procured, and hired the said entrymen and agents to make false, fictitious, feigned, illegal, forged, and fraudulent entries of the said coal lands and filings hereinbefore referred to at the said land office with the said register and receiver in the quantities allowed by law, in pursuance of said conspiracy, whereunder the said entrymen and agents and defendants were severally falsely and fraudu-

lently to execute and furnish to said register and receiver all the necessary papers, declarations, filings above specified, falsely purporting to be under oath in said false, fictitious, illegal, feigned, forged, and fraudulent entries, and, furthermore, that such statements, representations, affidavits, and filings would not be made under oath and subscribed and sworn to before any officer competent to administer an oath, and the jurat attached thereto, respectively, would be false, fictitious, forged, feigned, fraudulent, and illegal, and that the entrymen would, by means of such false, fictitious, illegal, feigned, forged, and fraudulent entries, obtained from the United States its title to said lands.

(i) Because in each of the attempted charges hereinbefore referred to under subdivisions (a), (b), (c), (d), (e), (f), (g), and (h) of this motion there are included allegations that the entries, filings, declaratory statements, powers of attorney, nonmineral affidavits,
126 and affidavits to purchase, and jurat therein referred to, were each of them false, fictitious, feigned, illegal, fraudulent, and forged, and it is nowhere alleged in any of said paragraphs, wherein said alleged conspiracy is charged, which of the said papers, by and through which the objects of said conspiracy were to be effected, were false, which were fictitious, which were illegal, which were feigned, which were forged, and which were fraudulent, or in what respect any of said defects existed.

(j) The said indictment fails to show any venue or to allege with any certainty whereto this defendant can plead as to the place where the alleged conspiracy was formed. It is alleged in said indictment that said conspiracy was made in the county of Garfield, in the county of Routt, and in the county of Denver, but it does not specify as to which of said three counties was the place wherein the alleged corrupt agreement, to which this defendant is charged to be a party, was formed, and defendant has no means of meeting said charge.

(k) The said first count is wholly defective, uncertain, and bad for duplicity in its failure to distinguish the alleged conspiracy and the objects embraced in the alleged corrupt agreement, as proposed to be done thereunder, from the alleged overt acts which are set up in specifications one to twenty-four, which are charged as the
127 overt acts done under said alleged corrupt agreement or conspiracy.

(l) The said first count is also bad for duplicity in that it alleges that it was a part of said corrupt agreement that the statements, representations, affidavits, and filings would not be made under oath, and subscribed and sworn to before any officer competent to administer an oath, and that the jurat attached thereto would be false, forged, feigned, and fraudulent, and it does not appear whether such jurat would be false, or fictitious, or feigned, or forged, or fraudulent, nor as to what particular documents the jurat would be false, nor as to what document it would be forged, nor as to what document it would be fictitious, nor as to what document it would be fraudulent, nor in what respect such document was subject to such defects, and said

charge is wholly unmeaning, and it is impossible for the defendant to plead thereto.

Third. The said first count is also uncertain, ambiguous, unintelligible, and vague in the following particulars:

(a) It can not be determined therefrom whether defendants are charged with inducing the filing of false, fraudulent, fictitious, forged, feigned, and illegal documents in respect to lands of the United States, or whether defendants are charged with con-
128 spiring to cause the register and receiver of the General Land Office to misconduct the governmental functions, or whether they are charged with a conspiracy to defraud the Government of its possession of certain valuable lands.

(b) It can not be determined whether the conspiracy was formed to induce the execution of false papers, or the execution of fictitious papers, or feigned papers, or illegal papers, or forged papers, or to execute fraudulent papers, or whether it was formed to hire and induce the filing of fictitious papers, or illegal papers, or fraudulent papers in the application for lands in the General Land Office, nor in what particular document or in what respect such defects exist.

(c) It can not be determined therefrom which of the several documents and papers therein referred to as included in said alleged unlawful agreement were false, which were fraudulent, which were fictitious, which were feigned, which were illegal, or which were forged, or in what respect any of said documents were false, or fraudulent, or fictitious, or feigned, or illegal, or forged.

(d) It does not set forth the particular document which is claimed in said count was a part of said conspiracy, and was forged, or false, or fraudulent, or fictitious, or feigned, or illegal.

129 (e) The said count is also ambiguous and uncertain and defective in that it does not state any acts of the conspirators, or any of them, by which the alleged conspiracy was formed.

(f) It is also ambiguous, uncertain, and defective in that it can not be determined from the allegations of said count whether the alleged conspiracy is claimed to be unlawful in the ends sought to be attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

Fourth. So much of the first count of the said indictment as is taken up with specifications of alleged overt acts numbered one to twenty-four, inclusive, is also bad for duplicity, ambiguity, and uncertainty in that the papers therein alleged to have been executed are described in said several specifications as false, fictitious, forged, feigned, fraudulent, and illegal, without showing which of said papers was false, or which was fictitious, or which was feigned, or which was forged, or which was fraudulent, or which was illegal, or in what respect said papers were illegal or void, and this is the case with each and every one of said specifications of the said alleged overt acts, numbered 1 to 24, inclusive, set forth in said first count of
130 said indictment, and it does not appear from any of said specifications in what particular respect the certain overt acts therein referred to were illegal or criminal.

SECOND COUNT.

II. This defendant further says that the second count of the said indictment is wholly insufficient in law to require any plea from him in the following particulars:

First. It does not charge this defendant with any crime against or under the laws of the United States.

Second. The second count of the indictment is bad in that, in the body of the indictment, the district attorney has referred to sec. 4746 of the R. S. of the U. S., charging that the false, forged, and fictitious affidavits which were filed, and which were procured to be filed, were in violation of said section 4746, which said section is a pension statute, and has reference only to the false affidavits filed or procured to be filed in reference to pension claims, or claims to bounty lands which is in the nature of a pension claim, and can not be construed to apply to false and forged affidavits filed or procured to be filed to procure title to coal lands.

Third. The second count is bad for duplicity for the following reasons:

131 (a) The first charge attempted to be alleged in the first portion of the said count is that this defendant and his codefendants did then and there unlawfully, wilfully, corruptly, wickedly, and knowingly conspire, combine, confederate, and agree with others named in the indictment to make and present false, fictitious, feigned, forged, illegal, and fraudulent papers and writings to the register and receiver of the land office in Glenwood Springs, in the District of Colorado.

(b) The second charge attempted to be alleged in the following portion of said second count of said indictment is that the defendant, with his codefendants, did conspire to procure and induce, persuade, and hire divers other persons, hereinafter called entrymen, and named by name as such in that part of the indictment wherein overt acts are charged to have been committed by said defendants, being overt acts numbered one to sixteen, inclusive, to make, subscribe, present, and cause to be made, subscribed, and presented to the said register and receiver of said land office at Glenwood Springs, in the county of Garfield, in the District of Colorado, said false, fictitious, feigned, forged, fraudulent, and illegal filings, declarations, affidavits, and certificates, respectively, and papers and writings purporting to be such.

132 (c) The next charge attempted to be alleged in said second count of said indictment is that the said defendant and his alleged conspirators caused certain filings, declarations, affidavits, and papers, and certificates purporting to be such, in the entry of lands which said defendant would well know to be false, fictitious, feigned, forged, fraudulent, and illegal, and contain false and fraudulent statements material to the matters aforesaid.

(d) The fourth charge attempted to be alleged in said second count of said indictment is that the said defendants, directly and

through their agents, by persuasion, promise, solicitation, and payment of rewards to said entrymen and agents in some small sum, the amount whereof is to the grand jurors unknown, did induce, procure, and hire the said entrymen and agents to make false, fictitious, feigned, forged, fraudulent, and illegal entries and filings hereinbefore referred to at the said office of the register and receiver in the quantities allowed by law, in pursuance of the said conspiracy, combination, and agreement between said defendants and their agents and the said entrymen.

(e) The fifth charge attempted to be alleged is that the
133 representations, affidavits, and filings in such entries were so made by said entrymen, would not be made under oath and subscribed to before any officer, and the jurat thereto would be false, fictitious, forged, feigned, fraudulent, and illegal, and that the said entrymen would, by means of such false, fictitious, feigned, forged, fraudulent, and illegal representations, affidavits, and filings in such entries, and by the payment to said land office of the price paid for such coal lands to obtain from the United States its title to said lands.

(f) Because in each of the attempted charges heretofore referred to under subdivisions (a), (b), (c), (d), and (e) of this motion there are included allegations that the entire filings, declarations, statements, powers of attorney, nonmineral affidavits, and jurats therein referred to were each of them false, fictitious, feigned, forged, fraudulent, and illegal, and it is nowhere alleged in any of such paragraphs wherein said alleged conspiracy is charged as to the papers through which the objects of the said conspiracy were to be effected were false, which were fictitious, which were illegal, which were forged, and which were fraudulent, or in what respects any of said defects existed as to each or any one of said papers.

(g) The said indictment fails to show any venue or to allege with any certainty whereto this defendant can plead, as to the place
134 where the said alleged conspiracy was formed. It is alleged in said indictment that said conspiracy was formed in the county of Routt, in the county of Garfield, and in the county of Denver, but it does not specify which of said three counties was the place wherein the alleged corrupt agreement to which this defendant is charged to be a party was formed, and the defendant has no means of meeting the said charge.

(h) The second count is wholly defective, uncertain, and bad for duplicity in its failure to allege the said conspiracy and the objects embraced in the alleged corrupt agreement as proposed to be done thereunder from the alleged overt acts which are set up in specifications numbered one to sixteen, inclusive, which are charged to be the overt acts done under said alleged corrupt conspiracy.

(i) The second count is also bad for duplicity in that it alleges that it was a part of said corrupt agreement that the statements, representations, affidavits, and filings would not be made under oath and subscribed to and sworn to before any officer competent to administer an oath, and that the jurat attached thereto would be false, fic-

titious, feigned, forged, and fraudulent and illegal, and it does not appear whether such jurat would be false, whether it would be fictitious, or feigned, or forged, or fraudulent, or illegal, nor as to what particular document the jurat would be false, and as to what
135 *and as to what* particular document it would be fictitious, nor as to what particular document it would be forged, nor as to what particular document it would be feigned, nor as to what it would be fraudulent, nor as to what it would be illegal, and the said charge is wholly unmeaning, and it is impossible for this defendant to plead thereto.

Fourth. The second count is also ambiguous, unintelligible, and vague in this:

(a) That it can not be determined therefrom whether the conspiracy was formed to induce the execution of false papers or the execution of fictitious papers, or feigned papers, or illegal papers, or forged papers, or the execution of fraudulent papers, or whether it was formed to hire and induce the filing of fictitious papers, or of feigned papers, or forged papers, or fraudulent papers, or illegal papers in the application for lands in the General Land Office.

(b) The said count is vague, ambiguous, uncertain, and unintelligible in that it can not be determined therefrom which of the several documents and papers therein referred to as included in said alleged unlawful agreement were false, which were fictitious, which were feigned, which were fraudulent, which were forged, which were illegal, or in what respect any of said documents were false,
136 feigned, fictitious, forged, fraudulent, or illegal.

(c) Said second count of said indictment is further defective, uncertain, ambiguous, and unintelligible in that it does not set forth the particular document which is claimed in said count was a part of said conspiracy and was forged, fictitious, false, fraudulent, and illegal.

(d) The said count is also ambiguous and uncertain and defective in that it does not state any acts of the conspirators, or any of them, by which the alleged conspiracy was formed.

(e) It is also ambiguous, uncertain, and defective in that it can not be determined from the allegations of said count whether the alleged conspiracy is claimed to be unlawful in the ends sought to be attained by said conspiracy or in the means whereby said alleged conspiracy was to be accomplished.

Fifth. So much of said second count of said indictment as is taken up with specifications of alleged overt acts numbered one to sixteen is also bad for duplicity, ambiguity, and uncertainty in that the papers therein charged to have been executed are described in said several specifications as false, fictitious, feigned, forged, fraudulent, and illegal, without showing which of said papers was false, which was fictitious, which was feigned, which was forged, which was
137 fraudulent, and which was illegal, or in what respect said papers were void or illegal, and that is the case with each and every one of said specifications of the said alleged overt acts num-

bered one to sixteen, inclusive, set forth in said second count of said indictment, and that it does not appear from any one of said specifications in what particular respect the certain overt acts therein referred to were illegal or criminal.

Sixth. The said indictment does not state facts sufficient to constitute a crime under the statutes of the United States, or at all, in that the formation of a conspiracy to commit an offense against the United States or to defraud the United States is not sufficiently set forth or at all; the place and manner of forming the alleged conspiracy, or the place and manner in which and at which the conspiracy was entered into is not set forth at all in either count of said indictment.

Seventh. The indictment is at variance with the bench warrants in this, that the bench warrants charge a conspiracy to defraud the United States out of land, whereas the indictment alleges a conspiracy to induce, persuade, procure, and hire divers persons to make false, fictitious, feigned, forged, fraudulent, and illegal entries and filings in the land office, and to cause the register and receiver
138 and Commissioner of the General Land Office to act, respectively, in administering the said laws and regulations of the United States otherwise than they would or could lawfully act.

Eighth. The indictment should be quashed for the further reason that the grand jurors, by whom said indictment was made and presented, were not regularly or legally summoned, empaneled, and sworn as required by the laws of the United States governing such procedure, in this, to wit:

At the May term of this court, on the 6th day of November, A. D. 1906, a grand jury was ordered to be summoned from certain counties named in the order, and the clerk of this court, in the presence of the marshal of this court, was ordered to draw by chance from the jury box the names of twenty-three persons, residents of the counties of Colorado, named in said order, and to summon them to appear on Tuesday, the 14th day of November, A. D. 1906, at ten o'clock a. m. under a venire facias made returnable on that day. Thereupon the names of twenty-three persons were drawn by the clerk, such names being fully set forth in the records of this court at page 350. Thereafter, on the 14th day of May, A. D. 1907, the United States marshal for the District of Colorado made return of the venire facias aforesaid, showing that thereunder he had summoned twenty-one
139 men to serve as grand jurors; that the twenty-one individuals so summoned appeared on the return day aforesaid, and for good and sufficient reasons to the court appearing seven of said number were excused from further attendance upon said court as grand jurors at that term, leaving less than sixteen, to wit, fourteen of the individuals originally summoned. Thereafter, upon these facts appearing to the court, a special venire facias was issued on said day, commanding the marshal to summon seven good and lawful men to attend and serve as grand jurors until discharged, which said venire facias

was made returnable on the 14th day of May, A. D. 1907, at two o'clock p. m.; that thereafter the marshal of this court, under said special venire facias, without drawing further names from the jury box, summoned from the city and county of Denver seven men whose names appear at page 415 of the records of this court; that the summoning of the said seven individuals under the special venire facias was contrary to law and rules of this court; that the seven individuals so summoned appeared, were duly sworn and empaneled with the fourteen of the original panel, and the twenty-one individuals so summoned, empaneled, and sworn constituted the grand jury which returned the indictment herein.

140 Ninth. Said indictment is also fatally defective in failing to allege in either of said counts that the register and receiver of said land office was authorized in law to receive and allow the applications referred to and set forth in said counts.

BYRON F. BABBITT,
Attorney for Defendant Frank P. Fay.

(Endorsed:) 2022. In the District Court of the United States for the District of Colorado. The United States *vs.* F. W. Keitel et al. Motion of defendant Frank P. Fay to quash said indictment. Filed Nov. 4, 1907. Charles W. Bishop, clerk. Byron F. Babbitt, attorney at law, St. Louis. Removed to 1605–14 Pierce Building.

In the United States District Court, District of Colorado.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* F. W. KEITEL, ARIE KEITEL, FRANK P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge, defendants.	No. 2022. Motion to quash indictment.

Comes now Walter S. Price, and moves the court to quash
141 the indictment heretofore filed in this court against this defendant, for the following reasons, to wit:

1st. That the said grand jury which returned the said indictment was not drawn, empaneled, and sworn in accordance with the laws of Congress in such case made and provided, in this, that more than sixteen (16) persons appeared in response to the summons of the United States marshal for the district of Colorado on the 14th day of May, A. D. 1907, whereupon seven (7) of the said jurors were by the court excused; that the court instead of ordering seven (7) additional names to be drawn from the box from which the original list of jurors were drawn, an order was entered commanding the marshal to summon seven (7) additional jurors from the body of the district, and did not order the same to be drawn from the box, as required by

law in such case made and provided; that under said order the writ issued to the marshal commanded the said marshal to "summon seven (7) good and lawful men, and that they personally be and appear etc.," without directing said men to be drawn from the district or from the box: that the said writ was made returnable at two o'clock of the same day upon which the same was issued, and for that reason could not be drawn from the body of the district, and was, in fact, drawn entirely from one locality, to wit, the city of Denver.

142 2nd. That it appears from the records of this court that other and different men did in fact constitute and sit as the grand jury than those who were originally drawn from the box, and who were by the marshal summoned to appear in court to serve as grand jurors. The names of those drawn and summoned who do not appear by the records of this court to have sat as such grand jurors being as follows, to wit, E. D. Welker, D. W. McNutt, J. M. Edwards, R. G. Parvin, J. H. Gillespie, L. J. Market, Frank K. Field, H. R. Smith, H. M. Bassette; whereas the records of this court show that Edwin D. Welker, David W. McNutt, Jacob M. Edwards, Roland G. Parvin, James H. Gillespie, Louis J. Markert, Frank R. Field, Hiram R. Smith, Henry M. Bassett sat as such grand jurors.

That these objections to the said grand jury could not be made by this defendant at an earlier time, for the reason that he did not

143 know, nor did he have any reason to believe that the said grand jury would return an indictment against him, and had no opportunity to either object to the manner of drawing or empannelling the said jury, and for the further reason that this said defendant is a citizen and resident of the city of St. Louis, State of Missouri, and that each and every of the said matters and things hereinbefore complained of tend greatly to prejudice and injure this defendant, in that it appears by the records of this court that the persons who did, in fact, sit as such grand jury were not the persons drawn and summoned as such grand jury, but were, in fact, other and different individuals.

3rd. That said indictment, and each count thereof, is fatally defective in this, that it is charged that the original conspiracy was formed and entered into in three different places, to wit, in the county of Garfield, in the county of Routt, and in the country of Denver, in the District of Colorado; that it is impossible to gather from the said indictment the place where the alleged conspiracy is charged to have been formed and consummated.

4th. That the said indictment, and each count thereof, is indefinite and uncertain in this, that it is therein charged that a certain conspiracy was entered into on the 11th day of June at three different places within the State of Colorado between this defendant and others, and it is impossible to ascertain from the said indictment the time and place where the alleged conspiracy was entered into.

144 5th. That the said indictment, and each count thereof, is fatally defective in this, that it charges three separate con-

spiracies, one entered into in the county of Routt, one in the county of Garfield, and one in the county of Denver; and it is impossible for this defendant to ascertain from the said indictment, or either count thereof, which alleged conspiracy it is here sought to prosecute upon.

6th. That said indictment, and each count thereof, attempts to charge three separate and distinct crimes in each count, in this:

(a) That it is alleged and charged in each count that the defendant and others formed a conspiracy to defraud the Government of its property, which said conspiracy it is sought under this indictment to make a crime.

(b) It is further charged in each count that this defendant and others formed a conspiracy to cause the officers of the Government to act otherwise than they would or lawfully could act in reference to their duties as such Government officers; which said conspiracy would, if proven, constitute a distinct statutory crime.

(c) It is further charged in each count that this defendant and others formed a conspiracy to execute and file, and to procure
145 others to make, execute, and file false, fictitious, feigned, illegal, forged, and fraudulent papers, which said act constitutes a separate and distinct statutory offense.

7th. That it is impossible for this defendant to ascertain from the said indictment, or from either count thereof, of what crime it is sought to be here charged against him, in this, that he is charged with filing false, fraudulent, feigned, illegal, forged, and fictitious papers with the land office at Glenwood Springs, Colorado, and that he is also charged with making false, fraudulent, feigned, illegal, forged, and fictitious entries in addition to the various charges of conspiracy hereinbefore set out, and it can not be ascertained by the defendant from said indictment, or either count thereof, whether he is here charged with such conspiracies, or whether with the making, or procuring to be made, false, fraudulent, feigned, illegal, forged, and fictitious papers and documents, or with the making of false, fraudulent, feigned, illegal, forged, and fictitious entries of coal lands.

8th. That the said indictment, and each count thereof, charges more than one offense, in this, that it charges the defendant with making false, fraudulent, feigned, illegal, forged, and fictitious papers and entries, which, in effect, charges the defendant
146 with at least six separate statutory crimes, to wit: False, fictitious, and feigned papers; illegal papers; and forged and fraudulent papers, together with false, fictitious, and feigned entries of public lands; illegal entries of public lands; and feigned and fraudulent entries of public lands.

9th. That the said indictment is bad for duplicity, and totally insufficient for the following reasons:

(a) That it charges a conspiracy to make false, fictitious, feigned, illegal, forged, and fraudulent entries and filings.

(b) That it has attempted to charge the defendant and others with conspiring to induce persons to make false, fictitious, illegal, feigned, forged, and fraudulent entries.

(c) It attempts to charge the defendant and others with a conspiracy to procure parties to enter powers of attorney, nonmineral affidavits, and affidavits to purchase.

(d) It attempts to charge the defendant and others with a conspiracy in causing the register and receiver and the Commissioner of the General Land Office of the United States to do acts and to act otherwise than they would or lawfully could have acted were they aware of the falsity of the representations and statements so charged to have been made by the said defendant.

(e) It attempts to charge the said defendant and others
147 with a conspiracy to furnish the entrymen with moneys to make the said entries and payments for the lands, and to require and receive conveyances from said entrymen to themselves of the titles of the said lands set forth in the said overt acts.

(f) It attempts to charge the defendant and others with conspiring to procure a quantity of land greatly in excess of that which they were lawfully entitled to obtain had said entries been lawful.

(g) It attempts to charge the said defendant and others with a conspiracy to defraud the Government of the United States of its governmental function in the matter of preserving and disposing of the said lands, as well as of its right to administer an intelligent and honest service in that behalf in the interests of the people of the United States.

(h) It attempts to charge a conspiracy to procure affidavits purporting to be legally sworn to, when, in fact, they were not, and thus procuring entries to be made by such means.

10th. That said first count is defective and uncertain, and bad for duplicity, in its failure to distinguish the alleged conspiracy and the business embraced in the alleged corrupt agreement, as proposed to be done thereunder, from the alleged overt acts which are set up in specifications one (1) to twenty-four (24), which are
148 charged as the overt acts done under the said alleged corrupt conspiracy.

11th. That the said first count is also bad and defective and uncertain in this, that it alleges it was a part of said corrupt agreement that the statements, representations, affidavits, and filings would not be made under oath and subscribed and sworn to before any officer competent to administer an oath, and that the jurat thereto would be false, forged, feigned, and fraudulent, and it does not appear whether such jurat would be false, or fictitious, or feigned, or forged, or fraudulent, nor as to what particular documents the jurat would be false, nor as to what document it would be forged, nor as to what document it would be fictitious, nor as to what document it

would be fraudulent, nor in what respect such document was subject to such defects; and said charge is wholly unmeaning and it is impossible for defendant to plead thereto.

12th. That the said second count is defective and uncertain, and bad for duplicity, in its failure to distinguish the alleged conspiracy and the business embraced in the alleged corrupt agreement, as proposed to be done thereunder, from the alleged overt acts which are set up in specifications one (1) to sixteen (16), which are charged as the overt acts done under said alleged corrupt conspiracy.

149 13th. That said first and second counts of the said indictment are wholly insufficient in law to require any pleading from this defendant in each and every of the particulars above specified.

14th. That neither of said counts charged this defendant with any crime against or under the laws of the United States.

15th. That if it is sought under the first count of said indictment to charge this defendant with a conspiracy under section 5440 of the Revised Statutes of the United States, this defendant says that the said indictment is wholly insufficient to charge any crime thereunder, of any kind or character whatever; that the said act, so far as it relates to the defrauding of the United States in the manner and form attempted to be charged in the said indictment, the said statute is unconsitutional and void, in that the same is retroactive in effect, and no crime can be charged thereunder with reference to coal lands, except that the alleged crime be by the court construed to be such as there is nothing to find as such in the statute.

16th. That said first count of the said indictment does not charge any offense against the defendants, in this: That the ends sought to be obtained by said alleged conspiracy are nowhere in the stat-

150 utes of the United States made a crime or an offense, and therefore is not the subject of a criminal conspiracy.

17th. The second count of said indictment is totally bad, uncertain, and defective, in this: That it does not set forth the particular document which it is claimed in said count was a part of said conspiracy, was forged, fictitious, false, fraudulent, and illegal.

18th. That said second count is ambiguous and uncertain and defective, in that it does not state any acts of the conspirators, or any of them, by which the alleged conspiracy was formed.

19th. That said second count is further ambiguous, uncertain, and defective, in this: That it can not be determined from the allegations of said count whether the said alleged conspiracy is claimed to be illegal in the ends sought to be obtained by the said conspiracy, or in the means whereby said alleged conspiracy was to be accomplished.

20th. That said second count is bad for duplicity because it does not set forth which of said papers described in the said alleged overt acts from one to sixteen were false, which were fictitious, which were forged, which were feigned, which were fraudulent, or which were

illegal; nor does it appear in any of the said alleged overt acts in what particular respect the said overt acts referred to were illegal or criminal.

151 21st. That said second count is insufficient to be pleaded unto by this defendant, for the reason that it does not state facts sufficient to constitute a crime under any statute of the United States, in that it does not state or set forth how or in what manner said conspiracy was formed, nor the place or manner of forming the same, nor the place where, nor the manner in which, the conspiracy was entered into.

22nd. That said second count is fatally defective in this: That in the body of the said count in which a crime is attempted to be charged it is alleged that the said acts were and are contrary to the provisions of section 4746 of the Revised Statutes of the United States, which said section of said statutes refers exclusively and solely to pension matters, and not to coal lands.

23rd. That the said indictment is totally bad and defective in law, and not sufficient to be pleaded to by this defendant, because this defendant is not advised by the said indictment, nor from either count thereof, the nature of the said charge, contrary to Amendment VI of the Constitution of the United States.

24th. That said indictment is fatally defective, because it no where appears in said indictment, nor in either count thereof, that

152 the said entrymen, so entering the said coal lands as alleged in said indictment, were not possessed of all the legal qualifications required by law of persons seeking to enter coal lands, there being no law barring an entryman from selling his coal lands or speculating therewith.

152 25th. Said indictment is also fatally defective in failing to allege in either of said counts that the register and receiver of the land office was authorized in law to receive and allow the applications referred to and set forth in said counts.

Wherefore this defendant files this his said motion to quash said indictment, and each count thereof, and prays that he be hence discharged.

SILSBEE D. LIEURANCE,
Attorney for the Defendant Walter S. Price.

(Endorsed:) No. 2022. In the United States District Court, District of Colorado. United States of America *vs.* F. W. Keitel, Arie Keitel, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge, defendants. Motion of Walter S. Price to quash indictment. Filed Nov. 5, 1907, Charles W. Bishop, clerk. Silsbee D. Lieurance, 404 Cooper Bldg., atty. for Walter S. Price.

153 In the United States District Court, District of Colorado.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* F. W. KEITEL, ARIE KEITEL, FRANK P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge, defendants.	No. 2022. Motion to quash indictment.

Comes now F. W. Keitel and Arie Keitel and move the court to quash the indictment heretofore filed in this court against these defendants for the following reasons, to wit:

1st. That the said grand jury which returned the said indictment was not drawn, empaneled, and sworn in accordance with the laws of Congress in such case made and provided, in this, that more than sixteen (16) persons appeared in response to the summons of the United States marshal for the district of Colorado on the 14th day of May, A. D. 1907, whereupon seven (7) of the said jurors were by the court excused; that the court instead of ordering seven (7) additional names to be drawn from the box from which the original list of jurors were drawn, an order was entered commanding the
154 marshal to summon seven (7) additional jurors from body of the district, and did not order the same to be drawn from the box, as required by law in such case made and provided; that under said order the writ issued to the marshal commanded the said marshal to "summon seven (7) good and lawful men, and that they personally be and appear, etc.," without directing said men to be drawn from the district or from the box; that the said writ was made returnable at two o'clock of the same day upon which the same was issued, and for that reason could not be drawn from the body of the district, and was in fact drawn entirely from one locality, to wit, the city of Denver.

2nd. That it appears from the records of this court that other and different men did in fact constitute and sit as the grand jury than those who were originally drawn from the box, and who were by the marshal summoned to appear in court to serve as grand jurors. The names of those drawn and summoned who do not appear by the records of this court to have sat as such grand jurors being as follows, to wit, E. D. Welker, L. J. Market, D. W. McNutt, Frank K. Field, J. M. Edwards, H. R. Smith, R. G. Parvin, H. M. Bassette, J. H. Gillespie; whereas the records of this court show that
155 Edwin D. Welker, Louis J. Market, David W. McNutt, Frank R. Field, Jacob M. Edwards, Hiram R. Smith, Roland G. Parvin, Henry M. Bassett, James H. Gillespie sat as such grand jurors.

That these objections to the said grand jury could not be made by these defendants at an earlier time, for the reason that they did not

know, nor did they have any reason to believe that the said grand jury would return an indictment against them, and had no opportunity to either object to the manner of drawing or empaneling the said jury, and for the further reason that each and all of these said defendants are citizens and residents of the city of St. Louis, State of Missouri, and that each and every of the said matters and things hereinbefore complained of tend greatly to prejudice and injure all these defendants, in that it appears by the records of this court that the persons who did, in fact, sit as such grand jury were not the persons drawn and summoned as such grand jury, but were, in fact, other and different individuals.

3rd. That said indictment, and each count thereof, is fatally defective, in this, that it is charged that the original conspiracy
156 was formed and entered into in three different places, to wit, in the county of Garfield, in the county of Routt, and in the county of Denver, in the district of Colorado; that it is impossible to gather from the said indictment the place where the alleged conspiracy is charged to have been formed and consummated.

4th. That the said indictment, and each count thereof, is indefinite and uncertain, in this, that it is therein charged that a certain conspiracy was entered into on the 11th day of June at three different places within the State of Colorado between these defendants and others, and it is impossible to ascertain from the said indictment the time and place where the alleged conspiracy was entered into.

5th. That the said indictment, and each count thereof, is fatally defective, in this, that it charges three separate conspiracies, one entered into in the county of Routt, one in the county of Garfield, and one in the county of Denver; and it is impossible for these defendants to ascertain from the said indictment, or either count thereof, which alleged conspiracy it is here sought to prosecute upon.

6th. That said indictment, and each count thereof, attempts to charge three separate and distinct crimes in each count, in this:

(a) That it is alleged and charged in each count that the defendants formed a conspiracy to defraud the Government of
157 its property, which said conspiracy it is sought under this indictment to make a crime.

(b) It is further charged in each count that the defendants formed a conspiracy to cause the officers of the Government to act otherwise than they would, or lawfully could, act in reference to their duties as such Government officers; which said conspiracy would, if proven, constitute a distinct statutory crime.

(c) It is further charged in each count that the defendants formed a conspiracy to execute and file, and to procure others to make, execute, and file, false, fictitious, feigned, illegal, forged, and fraudulent papers, which said act constitutes a separate and distinct statutory offense.

7th. That it is impossible for these defendants to ascertain from the said indictment, or from either count thereof, of what crime it is sought to be here charged against them, in this, that they are charged

with filing false, fraudulent, feigned, illegal, forged, and fictitious papers with the land office at Glenwood Springs, Colorado, and that they are also charged with making false, fraudulent, feigned, illegal, forged, and fictitious entries in addition to the various charges of conspiracy hereinbefore set out, and it cannot be ascertained by the defendants from said indictment, or either count thereof,
158 whether they are here charged with such conspiracies, or whether with the making, or procuring to be made, false, fraudulent, feigned, illegal, forged, and fictitious papers and documents, or with the making of false, fraudulent, feigned, illegal, forged, and fictitious entries of coal lands.

8th. That the said indictment, and each count thereof, charges more than one offense in this, that it charges the defendants with making false, fraudulent, feigned, illegal, forged, and fictitious papers and entries, which, in effect, charges the defendants with at least six separate statutory crimes, to wit, false, fictitious, and feigned papers, illegal papers, and forged and fraudulent papers, together with false, fictitious, and feigned entries of public lands, illegal entries of public lands, and feigned and fraudulent entries of public lands.

9th. That the said indictment is bad for duplicity and totally insufficient for the following reasons:

(a) That it charges a conspiracy to make false, fictitious, feigned, illegal, forged, and fraudulent entries and filings.

(b) That it has attempted to charge the defendants with conspiring to induce persons to make false, fictitious, illegal, feigned, forged, and fraudulent entries.

159 (c) It attempts to charge the defendants with a conspiracy to procure parties to enter powers of attorney, nonmineral affidavits, and affidavits to purchase.

(d) It attempts to charge the defendants with a conspiracy in causing the register and receiver and the Commissioner of the General Land Office of the United States to do acts and to act otherwise than they would, or lawfully could, have acted were they aware of the falsity of the representations and statements so charged to have been made by the said defendants.

(e) It attempts to charge the said defendants with a conspiracy to furnish the entrymen with moneys to make the said entries and payments for the lands, and to require and receive conveyances from said entrymen to themselves of the titles of the said lands set forth in the said overt acts.

(f) It attempts to charge the defendants with conspiring to procure a quantity of land greatly in excess of that which they were lawfully entitled to obtain had said entries been lawful.

(g) It attempts to charge the said defendants with a conspiracy to defraud the Government of the United States of its governmental function in the matter of preserving and disposing of the said lands, as well as of its right to administer an intelligent and honest service in that behalf in the interest of the people of the United States.

160 (h) It attempts to charge a conspiracy to procure affidavits purporting to be legally sworn to, when in fact they were not, and thus procuring entries to be made by such means.

10th. That said first count is defective and uncertain, and bad for duplicity, in its failure to distinguish the alleged conspiracy and the business embraced in the alleged corrupt agreement, as proposed to be done thereunder, from the alleged overt acts which are set up in specifications one (1) to twenty-four (24), which are charged as the overt acts done under said alleged corrupt conspiracy. spiracy.

11th. That the said first count is also bad and defective and uncertain in this; that it alleges it was a part of said corrupt agreement that the statements, representations, affidavits, and filings would not be made under oath and subscribed and sworn to before any officer competent to administer an oath, and that the jurat thereto would be false, forged, feigned, and fraudulent, and it does not appear whether such jurat would be false or fictitious or feigned or forged or fraudulent, nor as to what particular documents the jurat would be false, nor as to what document it would be forged, nor as to what document it would be fictitious, nor as to what document it would be fraudulent, nor in what respect such document was subject to such defects; and said charge is wholly unmeaning, and it

161 is impossible for defendants to plead thereto.

12th. That the said second count is defective and uncertain and bad for duplicity, in its failure to distinguish the alleged conspiracy and the business embraced in the alleged corrupt agreement, as proposed to be done thereunder, from the alleged overt acts which are set up in specifications one (1) to sixteen (16), which are charged as the overt acts done under said alleged corrupt conspiracy.

13th. That said first and second counts of the said indictment are wholly insufficient in law to require any plea from these defendants in each and every of the particulars above specified.

14th. That neither of said counts charge these defendants with any crime against or under the laws of the United States.

15th. That if it is sought under the first count of said indictment to charge these defendants with a conspiracy under section 5440 of the Revised Statutes of the United States, these defendants say that the said indictment is wholly insufficient to charge any crime thereunder of any kind or character whatever; that the said act, so far as it relates to the defrauding of the United States in the manner and form attempted to be charged in the said

162 indictment, the said statute is unconstitutional and void in that the same is retroactive in effect, and no crime can be charged thereunder with reference to coal lands except that the alleged crime be by the court construed to be such as there is nothing to find as such in the statute.

16th. That said first count in said indictment does not charge any offense against these defendants in this, that the ends sought to be

obtained by said alleged conspiracy are nowhere in the statutes of the United States made a crime or an offense, and therefore is not the subject of a criminal conspiracy.

17th. The second count of said indictment is totally bad, uncertain, and defective in this, that it does not set forth the particular document which it is claimed in said count was a part of said conspiracy was forged, fictitious, false, fraudulent, and illegal.

18th. That said second count is ambiguous and uncertain and defective in that it does not state any acts of the conspirators, or any of them, by which the alleged conspiracy was formed.

19th. That said second count is further ambiguous, uncertain, and defective in this, that it can not be determined from the allegations of said count whether the said alleged conspiracy is claimed to be illegal in the ends sought to be obtained by said conspiracy, or in the means whereby said alleged conspiracy was to be accomplished.

162 20th. That said second count is bad for duplicity, because it does not set forth which of said papers described in the said alleged overt acts from one (1) to sixteen (16) were false, which were fictitious, which were forged, which were feigned, which were fraudulent, or which were illegal; nor does it appear in any of the said alleged overt acts in what particular respect the said overt acts referred to were illegal or criminal.

21st. That said second count is insufficient to be pleaded unto by these defendants for the reason that it does not state facts sufficient to constitute a crime under any statute of the United States, in that it does not state or set forth how or in what manner said conspiracy was formed, nor the place or manner of forming the same, nor the place where, nor the manner in which, the conspiracy was entered into.

22nd. That said second count is fatally defective in this, that in the body of the said count in which a crime is attempted to be charged it is alleged that the said acts were and are contrary to the provisions of section 4746 of the Revised Statutes of the United States, which said section of said statutes refers exclusively and solely to pension matters and not to coal lands.

23d. That the said indictment is totally bad and defective
163 in law and not sufficient to be pleaded to by these defendants, because these defendants are not advised by the said indictment, nor from either count thereof, the nature of the said charge, contrary to Amendment VI of the Constitution of the United States.

24th. That said indictment is fatally defective, because it nowhere appears in said indictment, nor in either count thereof, that the said entrymen, so entering the said coal lands as alleged in said indictment, were not possessed of all the legal qualifications required by law of persons seeking to enter coal lands, there being no law barring an entryman from selling his coal lands, or speculating therewith.

25th. Said indictment is also fatally defective in failing to allege in either of said counts that the register and receiver of the land office

was authorized in law to receive and allow the applications referred to and set forth in said counts.

Wherefore these defendants file this their said motion to quash said indictment, and each count thereof, and pray that they be hence discharged.

EDWIN H. PARK,
Attorney for the Defendants, F. W. and Arie Keitel.

(Endorsed:) No. 2022. In the United States District Court, District of Colorado. United States of America *vs.* F. W. Keitel,
165 Arie Keitel, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge, defendants. Motion of F. W. Keitel and Arie Keitel to quash indictment. Filed Nov. 5, 1907. Charles W. Bishop, clerk. Edwin H. Park, Atty. for F. W. and Arie Keitel.

In the United States District Court, District of Colorado.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* F. W. KEITEL, ARIE KEITEL, FRANK P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge, defendants.	No. 2022. Motion to quash indictment.

Comes now Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge, and move the court to quash the indictment heretofore filed in this court against these defendants, for the following reasons, to wit:

1st. That the said grand jury which returned the said indictment was not drawn, empaneled and sworn, in accordance with the
166 laws of Congress, in such case made and provided, in this, that more than sixteen (16) persons appeared in response to the summons of the United States marshal for the district of Colorado on the 14th day of May, A. D. 1907, whereupon seven (7) of the said jurors were by the court excused; that the court instead of ordering seven (7) additional names to be drawn from the box from which the original list of jurors were drawn, an order was entered commanding the marshal to summon seven (7) additional jurors from the body of the district, and did not order the same to be drawn from the box as required by law, in such case made and provided; that under said order the writ issued to the marshal commanded the said marshal to "summon seven (7) good and lawful men, and that they personally be and appear, etc.," without directing said men to be drawn from the district or from the box; that the said writ was made returnable at two o'clock of the same day upon which the same

was issued, and for that reason could not be drawn from the body of the district, and was, in fact, drawn entirely from the one locality, to wit, the city of Denver.

2nd. That it appears from the records of this court that other and different men did in fact constitute and sit as the grand jury than those who were originally drawn from the box, and who were by the marshal summoned to appear in court to serve as grand jurors. The
167 names of those drawn and summoned who do not appear by the records of this court to have sat as such grand jurors being as follows, to wit: E. D. Welker, D. W. McNutt, J. M. Edwards, R. G. Parvin, J. H. Gillespie, L. J. Market, Frank K. Field, H. R. Smith, H. M. Bassette; whereas the records of this court show that Edwin D. Welker, David W. McNutt, Jacob M. Edwards, Roland G. Parvin, James H. Gillespie, Louis J. Markert, Frank R. Field, Hiram R. Smith, Henry M. Bassett, sat as such grand jurors.

That these objections to the said grand jury could not be made by these defendants at an earlier time, for the reason that they did not know, nor did they have any reason to believe that the said grand jury would return an indictment against them, and had no opportunity to either object to the manner of drawing or empanelling the said jury, and for the further reason that each and all of these said defendants are citizens and residents of the city of St. Louis, State of Missouri, and that each and every of the said matters and things
168 hereinbefore complained of tend greatly to prejudice and injure all these defendants, in that it appears by the records of this court that the persons who did, in fact, sit as such grand jury were not the persons drawn and summoned as such grand jury, but were, in fact, other and different individuals.

3rd. These defendants further show the court that no evidence of any kind whatever was introduced before the grand jury other than certain statements which the Government inspectors had, by threats and intimidation and by offers of immunity from prosecution, compelled these defendants to sign in the city of St. Louis, and which said statements these defendants did not have time nor opportunity to consider, nor to consult concerning the same, which said statements were prepared, as these defendants are informed and believe, and so charge the fact to be, by the inspectors themselves, and which said statements did not comport with the truth and would not have been signed except for such threats and intimidations; that each and all of these defendants were subpœnaed by the United States to be and appear at Denver before the said grand jury, but that before going before the said grand jury to testify they were shown the said statements, so made, as aforesaid, by the Government inspectors, and were informed by such inspectors that they must go before the grand jury and testify to the truth of such statements; that these defendants refused so to do. They were thereupon threatened by the said in-
169 spectors that unless they did so testify before the grand jury that the said inspectors would see to it that they were indicted, and that they could have their choice of either swearing falsely

before the grand jury to such false statements or going to the penitentiary; that the said Government inspectors, who were employed by the Government to procure evidence to present before the said grand jury upon which the said indictment was returned, took these defendants one at a time into a separate room, and in the presence of four or more of the said Government employes threatened, intimidated, used vile and opprobrious language towards these defendants, to induce and compel them to testify falsely before the said grand jury, and these defendants were compelled to seek the protection of this honorable court in this behalf; and this indictment was returned in some manner unknown to these defendants, but without any evidence of any character whatever having been introduced before the said grand jury other than said false statements, and which said false statements were known to the said inspectors who produced the same before the grand jury to be false, and to have been by these defendants declared to be false and the signatures thereto to have been secured by threats of arrest and imprisonment and intimidation.

170 4th. That said indictment, and each count thereof, is fatally defective in this, that it is charged that the original conspiracy was formed and entered into in three different places, to wit, in the county of Garfield, in the county of Routt, and in the county of Denver, in the district of Colorado; that it is impossible to gather from the said indictment the place where the alleged conspiracy is charged to have been formed and consummated.

5th. That the said indictment, and each count thereof, is indefinite and uncertain in this, that it is therein charged that a certain conspiracy was entered into on the 11th day of June at three different places within the State of Colorado between these defendants and others, and it is impossible to ascertain from the said indictment the time and place where the alleged conspiracy was entered into.

6th. That the said indictment, and each count thereof, is fatally defective in this, that it charges three separate conspiracies, one entered into in the county of Routt, one in the county of Garfield, and one in the county of Denver; and it is impossible for these defendants to ascertain from the said indictment, or either count thereof, which alleged conspiracy it is here sought to prosecute upon.

7th. That said indictment, and each count thereof attempts
171 to charge three separate and distinct crimes in each count in this:

(a) Taht it is alleged and charged in each count that the defendants formed a conspiracy to defraud the Government of its property, which said conspiracy it is sought under this indictment to make a crime.

(b) It is further charged in each count that the defendants formed a conspiracy to cause the officers of the Government to act otherwise than they would or lawfully could act in reference to their duties as such Government officers, which said conspiracy would, if proven, constitute a distinct statutory crime.

(c) It is further charged in each count that the defendants formed a conspiracy to execute and file, and to procure others to make, execute, and file, false, fictitious, feigned, illegal, forged, and fraudulent papers, which said act constitutes a separate and distinct statutory offense.

8th. That it is impossible for these defendants to ascertain from the said indictment, or from either count thereof, of what crime it is sought to be here charged against them, in this, that they are charged with filing false, fraudulent, feigned, illegal, forged, and fictitious papers with the land office at Glenwood Springs, Colorado, and they are also charged with making false, fraudu-
172 lent, feigned, illegal, forged, and fictitious entries in addition to the various charges of conspiracy hereinbefore set out, and it can not be ascertained by the defendants from said indictment, or either count thereof, whether they are here charged with such conspiracies, or whether with the making, or procuring to be made, false, fraudulent, feigned, illegal, forged, and fictitious papers and documents, or with the making of false, fraudulent, feigned, illegal, forged, and fictitious entries of coal lands.

9th. That the said indictment, and each count thereof, charges more than one offense, in this, that it charges the defendants with making false, fraudulent, feigned, illegal, forged, and fictitious papers and entries, which, in effect, charges the defendants with at least six separate statutory crimes, to wit: False, fictitious, and feigned papers; illegal papers; and forged and fraudulent papers, together with false, fictitious, and feigned entries of public lands; illegal entries of public lands; and feigned and fraudulent entries of public lands.

10th. That the said indictment is bad for duplicity and totally insufficient for the following reasons:

(a) That it charges a conspiracy to make false, fictitious, feigned, illegal, forged, and fraudulent entries and filings.

(b) That it has attempted to charge the defendants with
173 conspiring to induce persons to make false, fictitious, illegal, feigned, forged, and fraudulent entries.

(c) It attempts to charge the defendants with a conspiracy to procure parties to enter powers of attorney, nonmineral affidavits, and affidavits to purchase.

(d) It attempts to charge the defendants with a conspiracy in causing the register and receiver and the Commissioner of the General Land Office of the United States to do acts and to act otherwise than they would, or lawfully could, have acted were they aware of the falsity of the representations and statements so charged to have been made by the said defendants.

(e) It attempts to charge the said defendants with a conspiracy to furnish the entrymen with moneys to make the said entries and payments for the lands and to require and receive conveyances from said entrymen to themselves of the titles of the said lands set forth in the said overt acts.

(f) It attempts to charge the defendants with conspiring to procure a quantity of land greatly in excess of that which they were lawfully entitled to obtain had said entries been lawful.

(g) It attempts to charge the said defendants with a con-
174 spiracy to defraud the Government of the United States of its governmental function in the matter of preserving and disposing of the said lands, as well as of its right to administer an intelligent and honest service in that behalf in the interests of the people of the United States.

(h) It attempts to charge a conspiracy to procure affidavits purporting to be legally sworn to, when, in fact, they were not, and thus procuring entries to be made by such means.

11th. That said first count is defective and uncertain, and bad for duplicity, in its failure to distinguish the alleged conspiracy and the business embraced in the alleged corrupt agreement, as proposed to be done thereunder, from the alleged overt acts which are set up in specifications one (1) to twenty-four (24), which are charged as the overt acts done under said alleged corrupt conspiracy.

12th. That the said first count is also bad and defective and uncertain, in this: That it alleges it was a part of said corrupt agreement that the statements, representations, affidavits, and filings would not be made under oath and subscribed and sworn to before any officer competent to administer *and* oath, and that the jurat thereto would be false, forged, feigned, and fraudulent, and it does not appear whether such jurat would be false or fictitious or feigned or forged or fraudulent, nor as to what particular documents the jurat
175 would be false, nor as to what document it would be forged, nor as to what document it would be fictitious, nor as to what document it would be fraudulent, nor in what respect such document was subject to such defects; and said charge is wholly unmeaning, and it is impossible for defendants to plead thereto.

13th. That the said second count is defective and uncertain, and bad for duplicity, in its failure to distinguish the alleged conspiracy and the business embraced in the alleged corrupt agreement, as proposed to be done thereunder, from the alleged overt acts which are set up in specifications one (1) to sixteen (16), which are charged as the overt acts done under said alleged corrupt conspiracy.

14th. That said first and second counts of the said indictment are wholly insufficient in law to require any plea from these defendants in each and every of the particulars above specified.

15th. That neither of said counts charge these defendants with any crime against or under the laws of the United States.

16th. That if it is sought under the first count of said indictment to charge these defendants with a conspiracy under section 5440 of the Revised Statutes of the United States, these defendants
176 say that the said indictment is wholly insufficient to charge any crime thereunder of any kind or character whatever; that the said act, so far as it relates to the defrauding of the United States in

the manner and form attempted to be charged in the said indictment, the said statute is unconstitutional and void, in that the same is retroactive in effect, and no crime can be charged thereunder with reference to coal lands, except that the alleged crime be by the court construed to be such as there is nothing defined as such in the statute.

17th. That the said first count in said indictment does not charge any offense against these defendants, in this: That the ends sought to be obtained by said alleged conspiracy are nowhere in the statutes of the United States made a crime or an offense, and therefore is not the subject of a criminal conspiracy.

18th. The second count of said indictment is totally bad, uncertain, and defective, in this: That it does not set forth the particular document which it is claimed in said count was a part of said conspiracy was forged, fictitious, false, fraudulent, and illegal.

19th. That said second count is ambiguous and uncertain and defective, in that it does not state any acts of the conspirators, or any of them, by which the alleged conspiracy was formed.

20th. That said second count is further ambiguous, uncer-
177 tain, and defective, in this: That it cannot be determined from the allegations of said count whether the said alleged conspiracy is claimed to be illegal in the ends sought to be obtained by said conspiracy, or in the means whereby said alleged conspiracy was to be accomplished.

21st. That said second count is bad for duplicity, because it does not set forth which of said papers described in the said alleged overt acts from one (1) to sixteen (16) were false, which were fictitious, which were forged, which were feigned, which were fraudulent, or which were illegal; nor does it appear in any of the said alleged overt acts in what particular respect the said overt acts referred to were illegal or criminal.

22nd. That said second count is insufficient to be pleaded unto by these defendants for the reason that it does not state facts sufficient to constitute a crime under any statute of the United States, in that it does not state or set forth how or in what manner said conspiracy was formed, nor the place or manner of forming the same, nor the place where, nor the manner in which, the conspiracy was entered into.

23rd. That said second count is fatally defective in this, that in the body of the said count in which a crime is attempted to be
178 charged it is alleged that the said acts were and are contrary to the provisions of section 4746 of the Revised Statutes of the United States, which said section of said statutes refers exclusively and solely to pension matters and not to coal lands.

24th. That the said indictment is totally bad and defective in law, and not sufficient to be pleaded to by these defendants, because these defendants are not advised by the said indictment, nor from either count thereof, the nature of the said charge, contrary to Amendments V and VI of the Constitution of the United States.

25th. That said indictment is fatally defective, because it no where appears in said indictment, nor in either count thereof, that the said entrymen, so entering the said coal lands as alleged in said indictment, were not possessed of all the legal qualifications required by law of persons seeking to enter coal lands, there being no law barring an entryman from selling his coal lands or speculating therewith.

26th. Said indictment is also fatally defective in failing to allege in either of said counts that the register and receiver of the land office was authorized in law to receive and allow the applications referred to and set forth in said counts.

Wherefore these defendants file this their said motion to quash said indictment, and each count thereof, and pray that
179 they be hence discharged.

J. E. & W. G. SIMONSON,
Attorneys for the Defendants.

(Endorsed:) No. 2022. In the United States District Court, District of Colorado. United States of America vs. F. W. Keitel, Arie Keitel, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge, defendants. Motion of Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge to quash indictment. Filed Nov. 5, 1907. Charles W. Bishop, clerk. J. E. & W. G. Simonson, attys. for above moving parties.

180 Twenty-second day, November term. Saturday, November 30th, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA, *vs.* F. W. KEITEL, ARIE KEITEL, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck.	2022. Indictment for conspiracy.

At this day come Ernest Knaebel, esquire, and S. R. Rush, esquire, special assistants to the Attorney-General, who prosecute the pleas of the United States in this behalf, and the defendants F. W. Keitel and Arie Keitel by Edwin H. Park, esquire, and the defendants Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck by John E. Simonson, esquire, their attorneys, also come.

And the motions of the defendants F. W. Keitel, Arie Keitel, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck to quash the indictment herein, and the several demurrers of the said defendants to the indictment herein coming on now to be heard, are argued by counsel to the hour of adjournment.

181 Twenty-third day, November term. Monday, December 2nd, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA, *vs.* F. W. KEITEL, ARIE KEITEL, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck.	2022. Indictment for conspiracy.

At this day come Ernest Knaebel, esquire, and S. R. Rush, esquire, special assistants to the Attorney-General, who prosecute the pleas of the United States in this behalf, and the defendants F. W. Keitel and Arie Keitel by Edwin H. Park, esquire, and the defendants Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck, by John E. Simonson, esquire, their attorneys, also come.

And the motions of the defendants F. W. Keitel, Arie Keitel, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck to quash the indictment herein, and the several demurrers of the said defendants to the indictment herein coming on now to be heard, are argued by counsel to the hour of adjournment.

182 Twenty-fourth day, November term. Tuesday, December 3rd, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* F. W. KEITEL, ARIE KEITEL, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck.	2022. Indictment for conspiracy.

At this day comes Ernest Knaebel, esquire, special assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants F. W. Keitel and Arie Keitel by

Edwin H. Park, esquire, and the defendants Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck, by John E. Simonson, esquire, their attorneys, also come.

And the motions of the defendants F. W. Keitel, Arie Keitel, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck to quash the indictment herein, and the several demurrers of the said defendants to the indictment herein coming on now to be heard, are argued by counsel, and by the court taken under advisement.

Twenty-seventh day, November term. Friday, December 6th, A. D. 1907.

183 Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* F. W. KEITEL, ARIE KEITEL, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck.	2022. Indictment for conspiracy.

At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendant Lewis M. Rumsey by Frederick N. Judson, esquire, and Tyson S. Dines, esquire, his attorneys, also comes.

And the motion of the said defendant to quash the indictment herein coming on now to be heard is argued by counsel to the hour of adjournment.

Twenty-eighth day, November term. Saturday, December 7th, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* F. W. KEITEL, ARIE Keitel, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck.	2022. Indictment for conspiracy.

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At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in

this behalf, and the defendant Lewis M. Rumsey by Frederick N. Judson, esquire, and Tyson S. Dines, esquire, his attorneys, also comes.

And the motion of the said defendant to quash the indictment herein coming on now to be heard is argued by counsel and by the court taken under advisement.

Forty-first day, November term. Monday, December 30th, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* F. W. KEITEL, ARIE KEITEL, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck.	2022. Indictment for conspiracy.

185 At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants F. W. Keitel and Arie Keitel, by Edwin H. Park, esquire, their attorney, and the defendants Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge, by W. G. Simonson, esquire, their attorney, also come. And the several motions of the defendants F. W. Keitel and Arie Keitel, and of Frank P. Fay, and of Lewis M. Rumsey, and of Walter S. Price, and of Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge, to quash the indictment herein, having heretofore come on to be heard and having been argued by Ernest Knaebel, esquire, assistant to the Attorney-General, and by W. G. Simonson, esquire, attorney for Charles F. W. Haberbeck et al., and by Edwin H. Park, esquire, attorney for F. W. Keitel and Arie Keitel, and by Frederick N. Judson, esquire, and Tyson S. Dines, esquire, attorneys for Lewis M. Rumsey, and having been taken under advisement, and the court having considered the same and being now fully advised in the premises, it seemeth to the court now here that the indictment herein is not sufficient in law to be answered unto and so the said motions, and each thereof, are hereby granted, and that the first and second counts of the indictment herein be, and the same and
186 each thereof are hereby, quashed.

To which order and ruling of the court the plaintiff excepts and an exception is hereby allowed to it.

Forty-eighth day, November term. Wednesday, January 8th, A. D. 1908.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* F. W. KEITEL, ARIE KEITEL, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck.	2022.	Indictment for conspiracy.

At this day comes Ernest Knaebel, esquire, special assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and moves the court for the entry of judgment herein.

And it now appearing to the court that the orders entered in this cause at this same term, on the thirtieth day of November last, and the second and third days of December last, respectively, are incorrect in reciting that demurrers, in addition to motions to quash, were argued and taken under advisement; it is ordered in correc-
187 tion thereof that the word "demurrers" and all reference thereto wherever the same appear therein, be, and the same hereby are, expunged therefrom. And the motions of the defendants to quash the indictment, and each count thereof, having heretofore, and on, to wit, the thirtieth day of December last, at this same term, been granted, and the indictment, and each count thereof, thereupon ordered quashed, all for the reasons and upon the grounds, and none other, set forth and explained in the opinion of the court filed in this cause on that day.

It is now considered, ordered, and adjudged by the court that, upon the same grounds and for the same reasons, and none other, in the said opinion appearing, the defendants of and from the premises in this said indictment specified be discharged and go hence hereof without day.

It is further ordered by the court that if the United States shall sue out a writ of error to the Supreme Court of the United States from this order and judgment the defendants shall each enter into a personal recognizance before an United States commissioner in the sum of one thousand dollars ($1,000) conditioned that he shall personally appear in this court on the first day of the next term thereof at Denver and from day to day and from term to term thereafter, and answer the indictment herein if the judgment herein shall be reversed by the said Supreme Court, and until such recogni-
188 zances shall have been duly executed and filed with the clerk of this court the existing recognizances now on file in this

case shall be and remain binding upon the defendants and their respective sureties.

To which order and judgment quashing the said indictment the plaintiff then and there, at the time thereof, excepted, and an exception was allowed to it.

189 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
F. W. KEITEL, ARIE KEITEL, FRANK P. FAY, LEWIS M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck, defendants. } No. 2022.

Bill of exceptions.

Be it remembered that in this cause, on the 4th day of November, 1907, the defendants Lewis M. Rumsey and Frank P. Fay filed their several and respective motions to quash the indictment and each count thereof, and that thereafter, on the 5th day of November, 1907, in this cause, the defendant Walter S. Price filed his motion to quash the indictment and each count thereof, and the defendants F. W. Keitel and Arie Keitel filed their motion to quash the indictment and each count thereof, and the defendants Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge filed their motion to quash the indictment and each count thereof, which said five motions are respectively and fully set forth in words and figures in the transcript of the record proper of this cause, at pages 101 to 180 of such transcript, as such transcript is prepared and will be duly certified to the Supreme Court pursuant to the writ of error to be sued out by the United States for a review of the judgment and decision herein by that court; and in lieu of setting forth the said motions at large here in this bill of exceptions reference is hereby made to that part of the said transcript where they so appear, and the same are by this reference taken and considered as a part of this bill of exceptions as though here fully extended.

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And afterwards and on, to wit, the 30th day of November, 1907, and the 2nd, 3rd, 6th, and 7th days of December, 1907, before the court, the Hon. Robert E. Lewis, district judge, presiding, and Edwin H. Park, esquire, appearing as counsel for the defendants F. W. Keitel and Arie Keitel, and Will G. Simonson, esquire, as counsel for the defendants Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge, and Anna Dodge, and Silsbee

D. Leurance, esquire, as counsel for the defendant Walter S. Price, and Frederick N. Judson and Tyson S. Dines, esquires, as counsel for the defendant Lewis M. Rumsey, and Byron F. Babbitt, esquire, as counsel for the defendant Frank P. Fay, and Sylvester R. Rush and Ernest Knaebel, esquires, special assistants to the Attorney-General, appearing as counsel for the United States, this cause came on to be heard upon the indictment herein and the said respective motions to quash the same and each count thereof, and was argued by counsel, the defendant William Baer not then or at any other time having appeared in the cause. And upon the said argument there were cited and read to the court, by counsel for certain of the defendants, over the objection of counsel for the United States, the debates which occurred in Congress concerning the purpose and meaning of the act of July 7, 1898 (30 Stat. L., 718), amendatory of section 4746 of the Revised Statutes, at and preceding the passage of that act of July 7, 1898.

And thereafter on, to wit, the 30th day of December, 1907, of this same term, the court made its decision and order upon the matters so heard and argued, granting the said motions and each thereof, as to the indictment as a whole, and as to each count thereof, all for the reasons and upon the grounds, and those only, which are set forth in a certain written opinion then filed by the court in this cause, which opinion is in the words and figures as follows:

191 In the District Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
F. W. KEITEL ET AL., DEFENDANTS. } No. 2022. R. S. U. S., sec. 5440.

The indictment, in its first count, charges that the defendant F. W. Keitel, and his ten codefendants, on June 11th, 1904, in the county of Garfield, in the county of Routt, in the county of Denver, and within the district of Colorado, did unlawfully, etc., conspire, etc., together and with divers persons, some of whom are named and some whose names are to the grand jurors unknown, to make false, fictitious, feigned, illegal, forged, and fraudulent entries and filings, and to induce, persuade, procure, and hire divers other persons called entrymen and mentioned by name in the overt acts (from 1 to 24, both inclusive) to make false, fictitious, illegal, feigned, forged, and fraudulent entries and declaratory statements, applications to enter, powers of attorney, nonmineral affidavits, and affidavits at purchase in said entries at the United States land office at Glenwood Springs, in said district, of certain tracts of coal lands of the said United States, to

192 wit, the tracts mentioned in the overt acts as well as other tracts to the grand jurors unknown, amounting to five thousand acres, of the value of five hundred thousand dollars ($500,000), and at and in the making of such false, etc., entries and declaratory state-

ments, applications to enter and powers of attorney, nonmineral affidavits and affidavits at purchase in said entries, to make representations and statements of fact to the register and receiver of said land office, which would be known by the defendants, agents, and entrymen to be false, fraudulent, forged, and untrue in certain matters hereinafter specified, and thereby wrongfully, fraudulently, etc., cause the register and receiver and the Commissioner of the General Land Office to act, in administering the laws and regulations in that behalf made in pursuance of law, otherwise than they would or lawfully could act were they aware of such falsity, fraud, etc. That is to say, cause the said register and receiver and Commissioner to accept such false, fraudulent, etc., entries and filings herein specified from defendants, agents, and entrymen, and approve and make sale of such lands to such entrymen, agents, and defendants, and cause patents for such lands to be issued by the United States to said entrymen, agents, and defendants. The said register and receiver and Commissioner would in that behalf have no knowledge as to such facts and of such false, fraudulent, etc., entries, and would be au-
193 thorized and required to act by the said laws and regulations and receive such fraudulent filings and untrue statements and representations and false, etc., entries, as though they were true and in compliance with said laws and regulations; it being the intention and design of the defendants to furnish such entrymen with the moneys necessary to make payment to the receiver of the said land office of the price fixed by law for the said lands, and thereupon require and receive conveyances from said entrymen and agents to themselves, the defendants, and the Yampa Anthracite Coal Company, a corporation, and to thereby, by means of said false, fraudulent, etc., entries and filings, to indirectly, deceitfully, and fraudulently obtain for themselves and said corporation from the United States its said public lands in quantities greatly in excess of that which either, or any, or all of the said defendants and said corporation would lawfully be allowed to obtain directly from the United States, under a lawful administration of the said laws and regulations, and in that manner to defraud the United States of its lands and of its governmental function and out of its right to an intelligent and honest administration of its service in that behalf.

Said unlawful conspiracy was to be effected in the manner and by the means and methods now here described; that is to say, on the said June 11th, 1904, there was lying in the Glenwood Springs land
194 district * * * certain surveyed vacant public lands of the said United States known as coal lands * * * which were then open to entry at the said land office * * * under the laws of the said United States * * * and under the rules and regulations theretofore made and prescribed pursuant to law by the Commissioner of the General Land Office, * * * that is to say, the coal lands mentioned and described in this indictment and by legal subdivisions in the said overt acts numbered one to twenty-four, inclusive, in the first count, and one to sixteen in the second count. And

the said defendants directly and through their said agents, by persuasion, promise, solicitation, and payment of reward to the said entrymen and agents in some small sum the amount whereof is to the grand jurors unknown, to induce, procure and hire the said entrymen and agents to make said false, fictitious, feigned, illegal, forged and fraudulent entries of said coal lands and filings hereinabove referred to, at the said land office * * * in quantities allowed by law * * * under which the said entrymen, agents and defendants were severally falsely and fraudulently to execute and furnish to the said register and receiver all the necessary papers, declarations and statements and filings above specified, falsely purporting to be under oath, in said false, fictitious, illegal, feigned, forged, and fraudulent entries in lieu of the honest and bona fide entries, papers and filings required by the said laws and regulations from such entrymen in connection with the making of such entries, to the effect that each of said entrymen hereinafter charged in the several overt acts was then and there purchasing and intending to purchase his respective tract of such land for himself and not directly or indirectly for the use and benefit of any other person, and that he was in the actual possession of the same.

The indictment then charges that such statements, representations, affidavits, and filings would not be made under oath before an officer competent to administer an oath, that the jurats thereto would
195 be false, fictitious, forged, and fraudulent, that such entryman would then well know that he would not then be purchasing or intending to purchase such lands for himself at all but in collusion with and for the benefit of the defendants and said corporation, and would not then be in the actual possession of the same, and would be purchasing and intending to purchase his tract for the use and benefit of the defendants and said corporation. That under said agreement said entrymen were, by means of said false, fictitious, illegal, feigned, forged, and fraudulent entries and by payment to the receiver of the price fixed by law for such coal lands, to obtain title by patent and the use and benefit of said coal lands, said money being furnished to said entrymen by the defendants and said entrymen were to thereafter make conveyance of said lands to said defendants and said corporation.

The first count then proceeds to set out twenty-four overt acts.

The first overt act charges that the defendants, F. W. Keitel and Arie Keitel, on June 21st, 1904, did file and cause to be filed with the register and receiver of the land office at Glenwood Springs, coal cash entry No. 246 of one Margenau, and the papers, statements, and affidavits therein, to wit, declaratory statements, power of attorney, non-
mineral affidavit, corroborating nonmineral affidavit, and ap-
196 plication at purchase for 160 acres of coal lands there described, the said defendants having theretofore procured, hired, induced, and persuaded the said Margenau to subscribe his name to the said false, fictitious, forged, and fraudulent papers in said coal land entry.

The second overt act charges that the same two defendants on the same day unlawfully induced, persuaded, and hired one Barnes to subscribe his name to a certain nonmineral affidavit required by law and the rules and regulations of the Interior Department in the said coal land entry of said Margenau, to which affidavit said Barnes did not make oath, and the said two defendants thereafter filed the same with the register and receiver as a part of said entry.

The third overt act charges that the same two defendants on the same day did file and cause to be filed with said register and receiver coal cash entry No. 242 of one Dodge, the same character of papers and statements as named in the first overt act above.

The fourth overt act charges that the same two defendants, on the same day by the same means set out in overt act number two, procured said Barnes to make the same kind of written statement in the Dodge entry as charged in the second overt act to have been made in the Margenau entry, which paper defendants filed with the register and receiver.

197 The fifth overt act is like unto the first in coal cash entry No. 244 of one Gus Haberbeck.

The sixth overt act is like unto the second, that is, in procuring a statement from Barnes in the Haberbeck entry which defendants filed with the register and receiver.

The seventh overt act is like unto the first in its charge as to coal cash entry No. 247 of one Magdalena Haberbeck.

The eighth overt act is like unto the second in the procuring and filing of a like statement from said Barnes.

The ninth overt act is of date December 10th, 1904, and charges that the same two defendants made a certain nonmineral affidavit in the matter of the coal cash entry No. 279 of H. A. Meyer, and in procuring said Meyer to subscribe his name to certain other papers, statements, and affidavits in said coal cash entry.

The tenth overt act charges that defendant F. W. Keitel on December 24th, 1904, did make a certain nonmineral affidavit in coal cash entry No. 281 of Ben Hock and file the same with the register and receiver, and procured and hired said Hock to sign and file in said entry certain other papers, statements, and affidavits.

The eleventh overt act charges that the two Keitels, defendants, on December 27th, 1904, did file and cause to be filed with the register and receiver coal cash entry No. 276 of one Anna Dodge, and

198 the papers, statements, and affidavits therein, the said Anna Dodge having made and executed false, fictitious, and fraudulent papers in said coal entry.

The twelfth overt act charges that the defendant F. W. Keitel on December 10th, 1904, made a nonmineral affidavit in the coal entry of said Anna Dodge last aforesaid and filed the same with the register and receiver, and filed the other papers therein, to wit, declaratory statement, power of attorney, nonmineral affidavit, and application at purchase, said Anna Dodge having theretofore made and executed said papers.

The thirteenth overt act charges that the two Keitels, defendants, on December 27th, 1904, did file and cause to be filed with the register and receiver coal cash entry No. 272 of one Durnin, and other papers therein, as above noted, which papers the defendants had procured and hired the said Durnin to sign.

The fourteenth overt act charges that the two Keitels, defendants, on December 27th, 1904, did file and cause to be filed with the register and receiver, in the entry of said Durnin, a certain power of attorney, constituting one Rodda as the agent and attorney for said Durnin in said entry, the said defendants having procured and hired said Durnin to subscribe his name to said false, fictitious, feigned,
199 forged, and fraudulent power of attorney without making oath to the same.

The fifteenth overt act charges that the two Keitels, defendants, on December 27th, 1904, did file and cause to be filed with the register and receiver coal cash entry No. 270 of one Harnett, and the declaratory statement, power of attorney, nonmineral affidavits, corroborating nonmineral affidavits, and application at purchase for the 160 acres of coal lands there described, they having theretofore procured and hired said Harnett to subscribe his name to said fraudulent papers.

The sixteenth overt act charges that the two Keitels, defendants, on December 27th, 1904, did file and cause to be filed with the register and receiver in the said entry of said Harnett a certain power of attorney appointing one Rodda, the attorney of said Harnett in said entry having theretofore procured and hired said Harnett to subscribe his name to said false, fictitious, forged, and fraudulent power of attorney without making oath to the same.

The seventeenth overt act charges that the two Keitels, defendants, on December 27th, 1904, did file and cause to be filed with the register and receiver coal cash entry No. 274 of one Kate M. Kaplinger, and the declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase for the 160 acres of coal lands there described, said defendants having
200 theretofore hired and persuaded said Kaplinger to subscribe her name to said false, fictitious, forged, and fraudulent papers.

The eighteenth overt act charges that the two Keitels, defendants, on December 27th, 1904, did file and cause to be filed with the register and receiver in the entry of said Kaplinger a certain power of attorney appointing one Rodda her attorney, the said defendants having theretofore hired and persuaded said Kaplinger to subscribe her name to said false, fictitious, forged, and fraudulent power of attorney without making oath to the same.

The nineteenth overt act charges that the two Keitels, defendants, on December 27th, 1904, did file and cause to be filed with the register and receiver coal cash entry No. 271 of one Hyman, and the declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and applications to purchase for the 160 acres of

lands there described, they having theretofore hired and induced said Hyman to subscribe his name to said fales and fictitious papers.

The twentieth overt act charges that the two Keitels, defendants, on December 27th, 1904, did file and cause to be filed with the register and receiver in the coal entry of said Hyman a certain power of attorney identical, in effect, to the powers of attorney above described.

201 The twenty-first overt act charges that the two Keitels, defendants, on December 27th, 1904, did file and cause to be filed with the register and receiver coal cash entry No. 278 of one Charles F. W. Haberbeck, and the other papers like unto the ones above described and by the defendants obtained in the same manner as above set out.

The twenty-second overt act charges that the defendant, F. W. Keitel, on December 10th, 1904, made a certain nonmineral affidavit in the coal entry of said Charles F. W. Haberbeck, and filed the same, together with other papers, with the register and receiver as above set out in the other overt acts, the said papers having been obtained from the said Haberbeck in the manner above described.

The twenty-third overt act charges that the two Keitels, defendants, on February 2nd, 1905, filed and caused to be filed with the register and receiver coal cash entry No. 293 of one Lucas, and like papers obtained in like manner from said Lucas as above set forth in other overt acts.

The twenty-fourth overt act charges that the two Keitels, defendants, on December 17th, 1904, did persuade and hire one Hewett to subscribe his name to a certain nonmineral affidavit required by law and the rules and regulations of the Interior Department, to which affidavit the said Hewett did not make oath, and thereafter

202 file the same with the register and receiver as a part of a coal land entry.

SECOND COUNT.

The second count of the indictment charges a like conspiracy as in the first, but charges that the same was made and to be carried out in violation of section 4746, R. S., U. S. It then charges that the conspiracy was to consist in part in procuring, inducing, persuading, and hiring divers persons called entrymen, and mentioned by name in the overt acts in this count, to make and subscribe and present, and cause to be made, subscribed, and presented, to the register and receiver false, fictitious, feigned, illegal, forged, and fraudulent filings, declarations, affidavits, and certificates, and papers and writings purporting to be such, pertaining to the entry of said coal lands, and that said matter and proceeding before said register and receiver was within the jurisdiction of the Secretary of the Interior. That these declarations, affidavits, certificates, writings, papers, and filings so procured to be made by said entrymen were false, fictitious, feigned, illegal, forged, and fraudulent and in violation of said section 4746; that these false and fraudulent papers contained false and fraudulent statements material to the proceedings in the entry

of said lands. It is then charged that the purpose of the unlawful conspiracy was to be accomplished in the same manner as
203 set forth in the first count.

The sixteen overt acts set forth in the second count are so like those set forth in the first count that it is not necessary to notice them here in detail for the purpose of considering their legal effect.

It will only be necessary to consider sections 5440 and 4746, R. S. U. S., as applicable to this count.

In this indictment, and both counts thereof, motions to quash have been interposed.

FIRST COUNT.

The indictment in the first count attempts to charge a conspiracy under sec. 5440, R. S. U. S. That section and the act of March 3, 1873, known as the Coal Land Act, will require consideration. The indictment shows that the entries were what are commonly called cash entries, made under the first section of that act, and not what are known as preferential entries provided for under sections two and three of the act. The only filing with the register by the entryman under the first section of the act, if any, is his application. Hence, the indictment wherein it charges the making of false, etc., powers of attorney, nonmineral affidavits, and affidavits at
204 purchase and other representations and statements made to the register and receiver must be taken as charging a violation of the rules and regulations of the Land Office Department and the practice in the local land offices.

We first put out of view these rules and regulations, for they can not be made the basis of a crime. In United States v. Eaton, 144 U. S., 677, 687, it is said:

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a Department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 Am. & Eng. Enc. of L., 642; 4 Bl. Com., 5.

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under sec. 18 of the act. * * * Regulations prescribed by the President and by the heads of the Departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and must thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a

statute does not distinctly make the neglect in question a criminal offense."

205 To the same effect are the following:

United States v. United Verde Copper Co., 196 U. S., 207.
United States v. Manion, 44 Fed., 800.
United States v. Maid, 116 Fed., 650.
United States v. Blassingame, 116 Fed., 654.
United States v. Hoover, 133 Fed., 950.
United States v. Matthews, 146 Fed., 306.

When these rules and regulations are put by the side, what have we left? In substance this: That the defendants, under several agreements with qualified entrymen, induced said entrymen to severally enter at the land office coal lands within the limit of acreage prescribed by the act, for the use and benefit of the corporation and defendants, and pay for the same with moneys of the corporation. The only inquiry now is, whether we can find in what is left a crime under the second clause of sec. 5440, to wit, a conspiracy to defraud. The words of that clause of the section do not specifically spell out the offense. We look to the common law to find what they mean. In Pettibone v. United States, 148 U. S., 197, it is said: "The courts of the United States * * * resort to the common law for the definition of terms by which offenses are designated."

Certainly the term defraud as here used can not be accepted
206 in its broadest sense. If so, it would cover constructive fraud, known only in equity; and thus until the chancellor decrees on given facts, no man knoweth what offenses he hath committed. That sequence impresses me as a legal perversion.

Thus it seems that the case of the Trinidad Coal and Coke Company in 137 U. S., 161, so much relied on by the prosecution, can not be carried over into the domain of criminal jurisprudence, to be used here for the purpose of defining that term. It would therefore appear that the broadest stretch to which we can carry the term is to take it in its criminal aspect as known, if so known, to the common law. And when we seek to do that, no authority has been cited where the term has been used to sustain that view, so needful here. We can make the attempt to so understand it by analogy; but that step leads at once to find the crime by construction and implication, which we are not permitted to do. If the cases and doctrine at common law were obviously and unmistakably apposite, then it would not be construction, and the path would be clear. But they are not. In Todd v. United States, 158 U. S., 278, 282, we find this:

"It is axiomatic that statutes creating and defining crimes can not be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its
207 terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.' United States v. Lacher, 134 U. S., 624; Endlich on the Interpretation of Statutes, sec. 329, 2d ed.; Pomeroy's Sedgwick on Statutory and Constitutional Construction, 280."

But returning to the common law, there was there the offense known as cheats. It involved the use of a false device or token. It was carried also to the use of latent adulterations in food prepared for man and intended for use by many. They are discussed by Mr. Wharton in his work on criminal law, 7th ed., vol. 2, sec. 2056 et seq. These might be called primary offenses. Thereafter an act of Parliament made the obtaining of goods and chattels by false pretenses a crime; and like statutes are found in most of the States. The act of Parliament did not, however, extend this offense to the acquisition of realty. After a full discussion of the statutory offense last referred to, the same author treats of conspiracy as an offense, and in the course of his discussion reaches conspiracies where the means used are not criminal to accomplish an end not criminal; to which we find this preface (sec. 2316):

"At the same time it is important to keep in mind, especially at this point, the principles heretofore announced, that indictments for conspiracy, always perilous to liberty from the extent and vagueness of the province which they overshadow, are never so much so as when they undertake to punish acts of whose intrinsic criminality the law gives no prior notice. If indictments of this class, by stress of settled adjudications, must be hereafter tolerated, the doctrine on which they rest should be carried no further than the letter of these adjudications require."

208

In the list of cases which he then classifies as falling under this head we find none bearing any similitude to the crime here sought to be charged. I think it may be fairly concluded, from what that and other authors on criminal law say, as well as from the adjudicated cases, that in such conspiracies the ends intended by the conspirators must necessarily involve moral turpitude of the basest sort, in the results, if successful, such as threaten the health of a large body of people by the sale of impure food, or, in some instances, even life. The latter kind is aptly illustrated in United States v. Stone, 135 Fed., 392.

I am, therefore, deeply impressed with the belief that the Chief Justice meant his definition in Pettibone v. United States, 148 U. S., supra, to cover both clauses of sec. 5440. He said: "A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means;" saving, perhaps, such cases as when the facts bring them clearly within the rare common law doctrine, supra.

209

The entrymen were qualified as such, they obtained no more land than the acreage limited in the act, and they paid the price fixed by Congress. The only offending charged against the defendants is, that by their procurement the entrymen acted for the corporation. The act does not denounce what they did as criminal, nor does it place a prohibition against their conduct, so that we could

say their acts are therefore unlawful. But their acts are said to be violative of the policy disclosed by the coal land act. In Hadden v. The Collector, 5 Wall., 107, 111, Justice Field, speaking for the court, said:

"What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

When the coal land act was passed little was known of the locality and extent of coal measures in this western county; and if we were permitted in this case to seek for a policy in that act we would say that the predominant one was to induce the discovery and development of such deposits. If we could search further for a policy applicable in this day we would first weigh the appropriate words of Sharswood: "Time itself, which works such mighty
210 changes in all things, produces a state of circumstances not in the mind of the lawgiver."

And in connection with what has already been said it is necessary to bear in mind the rules of construction here applicable. In Smith v. Townsend, 148 U. S., 490, 497, we find this:

"Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule, most statutes against frauds being in their consequences penal. But this difference is here to be taken: Where the statute acts upon the offender, and inflicts a penalty, as the pillory, or a fine, it is then to be taken strictly; but when the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally." (1 Bl. Com., 88.)

In France v. United States, 164 U. S., 676, it is said:

"The statute does not cover the transaction and, however reprehensible the acts of plaintiff in error may be thought to be, we can not sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. * * * If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

The rule of strict construction in favor of a defendant charged with a crime, as well as the presumption of innocence and the
211 requirement that guilt must be proven beyond a reasonable doubt, are priceless heritages that have come down to us as warnings out of the bloody pages of tyranny and oppression. And while there be some who doubt their present day necessity, they remain unbroken. For further cases sustaining the rule, see

United States v. Clayton, 2 Dill., 219 (Fed. case No. 14,814).

United States v. Wiltberger, 5 Wheat., 76.

Francis v. United States, 188 U. S., 375.
United States v. Benecke, 98 U. S., 447.

I am clearly of the opinion that the first count does not state an offense, and the motion to quash is therefore sustained.

SECOND COUNT.

The indictment attempts to charge, in the second count, an offense under the first clause of sec. 5440, to wit, a conspiracy to commit an offense against the United States. The means to be used, as heretofore seen in the discussion on the first count, were neither criminal nor unlawful, but it is claimed that the end to be accomplished is a crime, to wit, a violation of sec. 4746, which is expressly penal; and it is further claimed that the acts charged bring the case
212 within the terms of the latter section. It is necessary to support the last contention in order to sustain the second count; we therefore direct our attention to that point.

This sec. 4746 was originally, and prior to amendment, sec. 33 of the act of March 3, 1873, which was entitled "An act to revise, consolidate, and amend the laws relating to pensions" (17 Stat. L., 566). That section (33) was amended by the act of July 7, 1898. We here give the original section (33) and the amended section (4746), the amendment being within parentheses, as follows:

"That every person who knowingly or willfully (makes of aids, or assists in the making or) in any wise procures the making or presentation of any false or fraudulent affidavit, declaration, certificate, voucher or paper, or writing purporting to be such, concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions (or of the Secretary of the Interior), or who knowingly or willfully (makes or causes to be made, or aids or assists in the making, or) presents or cause to be presented at any pension agency any power of attorney, or other paper required as a voucher in drawing a pension, which paper bears a date subsequent to that upon which it was actually signed or acknowledged (executed) (by the pensioner, and every person before whom any declaration, affidavit, voucher, or other paper or writing to be used in aid of the prosecution of any claim for pension or bounty land or payment thereof purports to have been executed, who shall knowingly certify that the declarant, affiant, or witness named in such declaration, affidavit, voucher, or other
213 paper or writing, personally appeared before him and was sworn thereto, or acknowledged the execution thereof, when, in fact, such declarant, affiant or witness did not personally appear before him or was not sworn thereto, or did not acknowledge the execution thereof), shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term of not more than five years."

The word acknowledged was inserted in place of executed.

Original sec. 33 received consideration in the Supreme Court in Edgington v. United States, 164 U. S., 361. The subject there specially treated was, whether sec. 5438 was repealed by sec. 4746 (being original sec. 33); the court said:

"We are unable to accept the contention that the latter section is to be deemed a repeal of the former. Undoubtedly there is some ground that is common to both. Thus the procuring or causing to be made a false deposition or affidavit in promoting a fraudulent pension claim is made an offense by both statutes. But the earlier statute is wider in its scope, because not restricted to fraudulent pension claims nor to merely procuring a false affidavit to be made."

In Pooler v. United States, 127 Fed., 509, sec. 4746, as now amended, was construed as applicable only in pension matters.

In view of the foregoing authorities, the title of the act, the phraseology of the section as amended, and the discussion of the amendment (record of which was exhibited in argument), I think under familiar rules of construction the amended section (4746) must be taken
214 as applicable only to pension matters (or claim for bounty land), before the Commissioner or Secretary.

It is urged that the broad language, "or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or of the Secretary of the Interior," should be taken to cover everything which those officers are given authority to hear. But it must be noticed that all of this was a part of the original act except the phrase "or of the Secretary of the Interior." Consequently the original act in the phrase "or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions" could not under the rule ejusdem generis go beyond the specific subjects therein names, to wit, claims for pension or bounty land; and for greater reason this must be so, when we consider the limited duties and jurisdiction of that officer as they existed then and now. I think the obvious purpose of the amendment, in the particular now considered, was to reach falsification before the Secretary in such matters when appealed to him from the Commissioner.

But inasmuch as two unreported cases from other districts have been called to my attention, in which my brothers appear to hold to the contrary, and seem to take the view that the phrase "or pertaining to any other matter" should be construed to cover all subject-
215 matters within the jurisdiction of either the Commissioner or Secretary, I waive my views in that particular here.

We come then to consider how we shall understand the section in this particular, "pertaining to any other matter within the jurisdiction * * * of the Secretary of the Interior." The indictment charges that the false filings, declarations, affidavits, certificates, papers, and writings used in each particular entry was a matter and proceeding before the register and receiver within the jurisdiction of the Secretary of the Interior. The register and receiver are not subordinate officers to the Secretary in the sense that they act for him and perform duties incumbent on him. They are not his agents. They

hold office under appointment by the President. They discharge duties fixed on them by statute. Their findings in some cases are final, in others there is a right of appeal to the Commissioner of the Land Office and from his rulings to the Secretary. What is meant by jurisdiction as here used. Its prime conception is one of power. When used in a political sense, it means governmental authority; such as when we say, the Federal Government has jurisdiction over navigable waters and interstate commerce, such as when we say, a State has jurisdiction over affairs purely local. The section does not use the phrase " within the jurisdiction of the Secretary of the
216 Interior " in that sense. That would smack too much of that imperialism, when the spirit of the Cæsars brooded over a vast empire, from whose capital city an impending hand reached out to its remotest confines.

The word jurisdiction must be here used in its legal sense, meaning authority to hear and determine a cause. (Daniels v. Tearney, 102 U. S., 415, 418; Simmons v. Saul, 138 U. S., 439, 454.)

But in determining whether the Secretary had authority to hear and determine the matters charged to have been presented to the register and receiver other statutes must be considered. He could not of his own motion take the matter then pending in the local land office to himself for decision. It could only reach him, if at all, by a process of appeal, as provided by statute. It is not charged that the matter was appealed to him. Indeed, it was tacitly admitted in argument that the matters progressed no further than where they were first lodged in the local land office with the register and receiver. In no event is jurisdiction acquired by a court or officer on whom the law confers the power until the power so given is exercised or invoked by an interested party. To hold that the Secretary had jurisdiction of the matters charged in the indictment would be to liken jurisdiction in its
217 legal sense to jurisdiction in its political sense, which can not be done under this statute. I think it clearly appears that the matters charged in the indictment were not within the jurisdiction of the Secretary as contemplated in sec. 4746.

But aside from this and waiving all that has been said, it appears from the indictment that the entries of coal lands complained of in the indictment were made under section 1 of the act of March 3, 1873. That act does not require of the entryman any of the affidavits, certificates, papers, and writings complained of in the second count. These papers must, therefore, have been required, if required at all, by the rules and regulations of the Land Office. The act may be said to require, in all propriety, a written application by the entryman showing that he is qualified as such and has not theretofore exercised his right; but these facts are not negatived. So we view the matters complained of as papers and writings required by rules and regulations. And in that condition we find ourselves again directly in opposition to the principles declared in United States v. Eaton, 144 U. S., 677, and many other cases cited, supra. We quote again from the Eaton case:

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation
218 of a Department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 Am. & Eng. Enc. of L., 642; 4 Bl. Com., 5.

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under sec. 18 of the act. * * * Regulations prescribed by the President and by the heads of the Departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and must thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

It seems to me that to hold that the second count charges an offense would be going in direct conflict with what is said in the Eaton case.

For these reasons the motion to quash the second count is also sustained.

Dec. 30th, 1907.

ROBT. E. LEWIS, *District Judge.*

219 To which decision and order of the court so, for the reasons and upon the grounds aforesaid, granting the said motions as to the first count of the indictment and quashing that count, the United States, by its counsel, then and there duly excepted; and to which decision and order of the court so, for the reasons and upon the grounds aforesaid, granting the said motions as to the second count of the indictment and quashing that count, the United States, by its counsel, then and there duly excepted; and to which decision and order of the court so, for the reasons and upon the grounds aforesaid, granting the said motions as to the indictment as a whole, and quashing the indictment, the United States, by its counsel, then and there duly excepted.

And thereafter, and on the 8th day of January, 1908, the said court made and entered its final judgment in this cause, pursuant to the said order and decision and based upon the reasons and grounds in the said opinion set forth, and those only, and, upon the said reasons and grounds, adjudging that the defendants of and from the premises in the indictment specified be discharged and go hence without day.

To which judgment of the court, and to each and every part thereof, and particularly to that part thereof adjudging that, for the reasons and upon the grounds aforesaid, in the said opinion expressed as aforesaid, the defendants of and from the premises in the indictment

specified be discharged and go hence without day, the United States, by its counsel, then and there duly excepted.

And forasmuch as the foregoing matters do not appear of record, the plaintiff tenders this its bill of exceptions, and prays that the same may be signed and duly authenticated and made a part of the record herein, which is accordingly done this 27th day of January, 1908.

ROBT. E. LEWIS, *District Judge.*

220 Service of the foregoing bill of exceptions was made upon us this 22" day of January, 1908.

(O. K.) EDWIN H. PARK,
Attorney for the defendants F. W. Keitel and Arie Keitel.

(O. K.) WILL G. SIMONSON,
Attorney for the defendants Charles F. W. Haberbeck, Magdalena Haberbeck, Gus Haberbeck, Charles H. Dodge and Anna Dodge.

(O. K.) S. D. LIEURANCE,
Attorney for the defendant Walter S. Price.

(O. K.) TYSON S. DINES,
Attorneys for the defendant Lewis M. Rumsey.

(O. K.) BYRON F. BABBITT,
Attorney for the defendant Frank P. Fay.

(Endorsed:) No. 2022. United States District Court, district of Colorado. The United States of America, plaintiff, v. F. W. Keitel et al, defendants. Bill of exceptions. Filed Jan. 27, 1908. Charles W. Bishop, clerk.

221 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
F. W. KEITEL, ARIE KEITEL, FRANK P. FAY, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck and Gus Haberbeck, defendants. } No. 2022.

Petition for writ of error.

And comes now the United States, plaintiff herein, and says that on the 30th day of December, 1907, this court made its decision quashing and setting aside the indictment in this cause, and that thereafter, and on the 8th day of January, 1908, this court, pursuant to that decision, entered judgment herein in favor of the defendants and

against this plaintiff, in which judgment and decision certain errors were committed to the prejudice of this plaintiff, and of such a character as to entitle this plaintiff, under the law, to review the said judgment and decision in the Supreme Court of the United States by writ of error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

222 RALPH HARTZELL,
Ass't. & Acting United States Attorney for the District of Colorado,
ERNEST KNAEBEL,
Special Assistant to the Attorney-General,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Colorado, ss.

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district, under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

Dated, Denver, Colorado, January 27th, 1908.

ROBT. E. LEWIS, *District Judge.*

(Endorsed:) No. 2022. United States District Court, district of Colorado. The United States of America, plaintiff, v. F. W. Keitel et al., defendants. Petition for writ of error. Filed Jan. 27, 1908. Charles W. Bishop, clerk. Earl M. Cranston, U. S. attorney for the district of Colorado, Ernest Knaebel, special assistant to the Attorney-General, attorneys for plaintiff.

223 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
F. W. KEITEL, ARIE KEITEL, FRANK P. FAY, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck, defendants.
No. 2022.

Assignment of errors.

Comes now the United States of America, plaintiff in the above-entitled cause, and files this assignment of errors to the judgment

heretofore entered by the District Court for the District of Colorado in the above-entitled cause, to wit:

First. The District Court for the District of Colorado erred in granting the several and respective motions of the above-named defendants to quash the indictment and each count thereof in the above-entitled cause, and in quashing the said indictment and each count thereof, and in thereupon rendering judgment for the defendants.

Second. The said District Court erred in granting the said
224 motions as to the first count of the indictment, and in quashing that count of the indictment.

Third. The said District Court erred in granting the said motions as to the second count of the indictment, and in quashing that count of the indictment.

Fourth. The said District Court erred in quashing the first count of the indictment upon and because of an erroneous construction of section 5440 of the Revised Statutes as amended (21 Stat. L., p. 4), whereby the said District Court, in substance and effect, held that the scheme and conspiracy in that count described would, if carried out, work no defrauding of the United States within the meaning of that statute, although such scheme and conspiracy so described, contemplated, and intended, and for its effectuation necessarily involved, both the obtaining from the United States of valuable coal lands in excess of the quantity allowed by law, and the accomplishment of that result by deceiving the officials of the Land Department through the making of false representations of material facts, and the creation through conduct and concealment of false and deceptive appearances, all tending, and by the conspirators designed, to induce such officials to believe to be lawful and bona fide, and therefore to act favorably upon, applications to enter coal lands, which in fact would be fraudulent and unlawful.

Fifth. The said District Court erred in omitting to follow and apply the decision of the Supreme Court in United States vs. The Trinidad Company, 137 U. S., 161.

Sixth. The said District Court erred in its construction of section 5440 of the Revised Statutes as amended, in holding that the
225 word "defraud" therein refers solely to such frauds as at common law were punished as substantive, independent criminal offenses.

Seventh. The said District Court erred in holding that the conspiracy described in the first count of the indictment is not such as at common law, and tested by common-law principles and precedents without more would have been punishable as a criminal conspiracy.

Eighth. The said District Court erred in misconstruing section 5440 of the Revised Statutes, as amended, in connection with the general definition of conspiracy given in Pettibone v. United States, 148 U. S., 197, so as to limit and restrain the application of that statute to conspiracies to commit substantive, independent criminal

offenses against the United States, and conspiracies to defraud the United States necessarily involving the commission of such substantive, independent criminal offenses.

Ninth. The said District Court erred in its construction of section 5440 of the Revised Statutes, as amended, in holding that no agreement or conspiracy is within the denunciation thereof which does not contemplate and involve the perpetration of some act, either amounting to an independent crime under some other act of Congress, or unlawful in the restricted sense of being an act distinctly and specifically prohibited by some other act of Congress.

Tenth. The said District Court erred in quashing the first count of the indictment upon the basis of the erroneous statutory constructions indicated in the fourth, sixth, eighth, and ninth specifications of this assignment of errors.

226 Eleventh. The said District Court erred in construing section 4746 of the Revised Statutes, as amended by the act of July 7, 1898 (30 Stat. L., p. 718), as applicable only to pension matters, and not to matters touching the public lands within the jurisdiction of the Secretary of the Interior.

Twelfth. The said District Court erred in holding that the coal entry proceedings mentioned in the second count of the indictment, and concerning and pertaining to which the false and fraudulent affidavits and other writings therein referred to, were to be made, filed, and presented pursuant to the conspiracy in that count charged, could not be matters "within the jurisdiction of the Secretary of the Interior," within the meaning of section 4746 of the Revised Statutes as the same stands amended by the act of July 7, 1898 (30 Stat. L., p. 718).

Thirteenth. The said District Court erred in construing section 4746 of the Revised Statutes, as amended by the act of July 7, 1898 (30 Stat. L., p. 718), where the same denounces as a crime the act of procuring the making or presentation of false and fraudulent affidavits and declarations pertaining to any matter within the jurisdiction of the Secretary of the Interior, as including only cases where such spurious affidavits and declarations are to be used in simulated compliance with some statute specifically requiring the making and filing of designated writings of that character and not to cases where the requirement so fraudulently to be met is found in rules and regulations of the Land Department, made and adopted pursuant to statutory authority, and for the purpose of enabling that department to obtain proofs material and necessary for the proper performance of its legal duties.

227 Fourteenth. The said District Court erred in quashing the second count of the indictment upon the basis of, and because of, the erroneous statutory constructions and interpretations indicated in the eleventh, twelfth, and thirteenth specifications of this assignment of errors.

Fifteenth. The said District Court erred in holding that the facts set forth in the first count of the indictment in this case, although sufficient to justify a court of equity in setting aside, for fraud, at the suit of the United States, patents for coal lands obtained in the manner stated in said indictment, do not amount to a fraud upon the United States within the meaning of section 5440 of the Revised Statutes (as amended), making it an offense for two or more persons to conspire to defraud the United States in any manner or for any purpose.

Wherefore, the United States of America prays that the judgment of the District Court of the United States for the district of Colorado be reversed, and that the said District Court be directed to reinstate the said indictment and proceed with the trial of the cause.

RALPH HARTZELL,
Assistant and Acting United States Attorney
for the District of Colorado,
ERNEST KNAEBEL,
Special Assistant to the Attorney-General,
Attorneys for the United States.

(Endorsed:) No. 2022. In the U. S. District Court. The United States of America, plaintiff, vs. F. W. Keitel, Arie Keitel, Frank P. Fay, Lewis M. Rumsey, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck, defendants. Assignment of errors. Filed January 27, 1908. Charles W. Bishop, clerk. Earl M. Cranston, U. S. attorney, for the district of Colorado.

228 Fifty-seventh day, November term. Monday, January 27th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs.
F. W. KEITEL ET AL. } 2022. Indictment for conspiracy.

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed, and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district, under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

229 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States for the district of Colorado.

UNITED STATES
versus
F. W. KEITEL ET AL. } No. 2022.

The clerk will issue a complete transcript of the record in the above-entitled cause, said transcript to contain indictment, all motions, and all orders of court, together with the opinion of the court.

EARL M. CRANSTON,
Attorney for U. S.

To CHARLES W. BISHOP, *Clerk.*

Denver, Colorado, Jan. 4, 1908.

(Endorsed:) No. 2022. United States District Court for the district of Colorado. U. S. versus F. W. Keitel et al. Praecipe for transcript of record. Filed Jan. 4, 1908. Charles W. Bishop, clerk. Earl M. Cranston, attorney for U. S.

230 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judge of the District Court of the United States for the district of Colorado, greeting:

Because in the decision, record, and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between the United States of America, plaintiff, and F. W. Keitel, Arie Keitel, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck, defendants, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of January, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] CHARLES W. BISHOP,
Clerk of the Circuit Court of the United States
for the District of Colorado.

Allowed by
ROBT. E. LEWIS,
Judge of the United States District Court
for the District of Colorado.

231 *Return.*

THE UNITED STATES OF AMERICA.
District of Colorado, ss.

In obedience to the command of the within writ, I herewith transmit to the honorable the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said United States District Court for the District of Colorado, at Denver, in said district, this first day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

232 (Indorsed:) No. 2022. United States District Court, District of Colorado. The United States of America, plaintiff, v. F. W. Keitel et al., defendants. Writ of error. Filed in United States District Court, district of Colorado, January 27, 1908. Charles W. Bishop, clerk.

233 UNITED STATES OF AMERICA, *ss:*

To F. W. Keitel, Arie Keitel, Frank P. Foy, Lewis M. Ramsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the District of Colorado, sitting at Denver, wherein the United States is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert E. Lewis, judge of the United States District Court for the District of Colorado, this 27th day of

January, in the year of our Lord one thousand nine hundred and eight.

ROBT. E. LEWIS,
Judge of the District Court of the United States for the District of Colorado.

We hereby acknowledge service of the foregoing citation, this 29th day of January, 1908.

TYSON S. DINES,
Attorney for Defendant Rumsey.
BYRON F. BABBITT,
Attorney for Defendant Fay.
EDWIN H. PARK,
Att'y for Deft's F. W. & Arie Keitel.
S. D. LAURANCE,
Attorney for Defendant Walter S. Price.
WILL G. SIMONSON,
Attorney for Chas. H. Dodge, Anna Dodge, Chas. F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck.

(Indorsed:) 2022. U. S. District Court, district of Colorado. The United States of America v. F. W. Keitel et al. Citation. Filed Jan. 30, 1908. Charles W. Bishop, clerk.

234 UNITED STATES OF AMERICA, *ss:*

To F. W. Keitel, Arie Keitel, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the District of Colorado, sitting at Denver, wherein the United States is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert E. Lewis, judge of the United States District Court for the District of Colorado, this 27th day of January, in the year of our Lord one thousand nine hundred and eight.

(Signed) ROBT. E. LEWIS,
Judge of the District Court of the United States for the District of Colorado.

I hereby acknowledge service of the foregoing citation, this 30th day of January, 1908.

WM. BAER.

(Indorsed:) 2022. United States District Court, district of Colorado. The United States of America v. F. W. Keitel, William Baer, et al. Copy of citation. Filed Feb. 4, 1908. Charles W. Bishop, clerk.

234½ UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to two twenty-nine (229), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings and other matters set forth in præcipe filed herein, together with a true copy of such præcipe and bill of exceptions, petition for writ of error, and assignments of error, and judgment and all other matters (exclusive of bench warrants, recognizances, and briefs) heretofore filed or entered of record in said court, and in a certain case lately in said court pending wherein The United States of America was plaintiff and F. W. Keitel, Arie Keitel, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magadalena Haberbeck, and Gus Haberbeck were defendants, as fully and completely as the same still remain on file and of record in my office at Denver.

And I further certify that I have annexed to and transmit herewith a copy of all opinions heretofore handed down and filed in said case.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the city and county of Denver in said district, this 3rd day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

* * * * * * *

263 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from two thirty-five (235) to two sixty-three (263) to be a true, perfect, and complete transcript and copy of all opinions heretofore handed down and filed in said court and in a certain case lately in said court pending wherein the United States of America was plaintiff and F. W. Keitel, Arie Keitel, Frank P. Fay, Lewis M. Rumsey, William Baer, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck were defendants, as fully and completely as the same still remains on file in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the city and county of Denver in said district this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

264 In the Supreme Court of the United States, October term, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
F. W. KEITEL ET AL. } No. 625.

Stipulation.

It is hereby stipulated by counsel for the parties to the above-entitled cause that in the printing of the transcript of the record herein the clerk of the Supreme Court shall omit pages 235 to 263, inclusive (being the opinion of the court herein), the same appearing elsewhere in the transcript of the record, to wit, at pages 191 to 218, inclusive.

H. M. HOYT,
Solicitor-General.
TYSON S. DINES,
EDWIN H. PARK,
Counsel for Defendants in Error.

February, 1908.

265 In the Supreme Court of the United States, October term, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
F. W. KEITEL ET AL. } No. 625.

Stipulation.

It is hereby stipulated by counsel for the parties to the above-entitled cause that in the printing of the transcript of the record herein the clerk of the Supreme Court shall omit pages 235 to 263, inclusive (being the opinion of the court herein), the same appearing elsewhere in the transcript of the record, to wit, at pages 191 to 218, inclusive.

H. M. HOYT,
Solicitor-General.
WM. BAER,
Defendant in Error.

February, 1908.

(Indorsed:) File No. 21028. Supreme Court U. S. Octo-
266 ber term, 1907. Term No. 625. The United States, p. e., vs. F. W. Keitel et al. Stipulations to omit part of record in printing. Filed February 29, 1908.

(Indorsement on cover:) File No. 21028. Colorado D. C. U. S. Term No. 625. The United States, plaintiff in error, vs. F. W. Keitel, Arie Keitel, Frank P. Fay, et al. Filed February 19th, 1908. File No. 21028.

O

7

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 287.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ROBERT FORRESTER, BENJAMIN N. FREEMAN, OTIS B. SPENCER, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED FEBRUARY 19, 1908.

(21029.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 626.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ROBERT FORRESTER, BENJAMIN N. FREEMAN, OTIS B. SPENCER, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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1 Pleas in the District Court of the United States for the District of Colorado sitting at Denver.

Be it remembered that heretofore and on, to wit, the twenty-second day of June, A. D. 1907, the same being one of the regular juridical days of the May term, A. D. 1907, of said court;

Present: The Honorable Robert E. Lewis, district judge, the following proceedings were had and entered of record in said court, to wit:

In the matter of the grand jury.

At this day come the members of the grand jury, heretofore duly empanelled and sworn as grand jurors, and return into court now here the following true bills of indictment, to wit:

* * * * * * *

THE UNITED STATES OF AMERICA *vs.* ROBERT FORRESTER, BENJAMIN N. FREEMAN, Otis B. Spencer, Frank Eldredge, and George C. Franklin.	2026. Indictment for conspiracy.

(Endorsed:) A true bill.

(Signed) E. D. WELKER, *Foreman.*

And thereupon, it is ordered by the court that a bench warrant issue without delay against the defendants and returnable
2 forthwith; and that the defendants be let to bail before an United States commissioner for their appearance in this court from day to day and from term to term, to answer unto the indictment herein, as follows, to wit: Robert Forrester in the sum of five thousand dollars ($5,000), Benjamin N. Freeman in the sum of five thousand dollars ($5,000), Otis B. Spencer in the sum of five thousand dollars ($5,000), Frank Eldredge in the sum of five thousand dollars ($5,000), and George C. Franklin in the sum of three thousand dollars ($3,000).

* * * * * * *

And the said indictment is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
District of Colorado, ss:

At the May term of the District Court of the United States for the District of Colorado, in the year of our Lord nineteen hundred and seven, begun and held at the city and county of Denver, in said district, on the first Tuesday of May, in the year or our Lord nineteen hundred and seven.

The grand jurors of the United States, within and for said District of Colorado, duly selected from the body of said district, and duly empaneled, sworn and charged, on their oaths present:

That Robert Forrester, Benjamin N. Freeman, Otis B. Spencer, Frank Eldredge, and George C. Franklin, all late of said
3 district, and all of whom are hereinafter designated collectively as "the defendants," on the first day of July, in the

year of our Lord nineteen hundred and five, at the city of Durango, in said district, unlawfully, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together and with Stephen Monroe Fields, Joseph W. Dobbins, Robert S. Clements, Thomas L. Loftus, John J. McKinnon, and George W. Franklin (who, to wit, the six persons last named, together with the said George C. Franklin, are hereinafter designated and intended by the designation of "agents"), and with one William H. Bird, now deceased, and also with divers other persons to the said grand jurors unknown, to defraud the United States of its valuable coal lands situate in said judicial district, in the district of lands attached to its land office at Durango aforesaid, and especially of all and singular those tracts and parcels of its coal lands therein, which are hereinafter particularly described by legal subdivisions, and of its right, function and privilege of protecting its ownership in said coal lands and of disposing of the said coal lands only in the manner provided by its laws, rules, and regulations respecting coal land entries, and of its right and privilege of relying, and of its security in relying, through the proper officials of its Land Department, to wit, the register and
4 receiver of its said land office and the Commissioner of its General Land Office, in the matter of the disposing of said lands under said laws, upon the good faith of all such persons as might make application to enter and purchase the same, or any of them, and upon the truth of all material statements and representations that might be made by any such persons so applying in the papers and documents that might be filed by them or any of them at said land office, in apparent compliance with the said rules and regulations and in relation to and proof of their respective rights to enter and purchase any of such lands under the said laws.

The ultimate object and purpose of the said unlawful and wicked conspiracy were by means of the false and fraudulent representations, entries and deeds hereinafter mentioned, and receiver's receipts and patents to be procured as hereinafter alleged, to deprive and defraud the United States of its title, possession, use, and enjoyment of the said coal lands and obtain the said coal lands, and the title, possession, use, and enjoyment thereof, for a certain private corporation, organized and existing under and by virtue of the laws of the State of Colorado, called the Calumet Fuel Company, in a quantity and total acreage far greater than the said corporation could lawfully acquire under and by virtue of said law.

The said lands, of which the United States was so to be de-
5 frauded were all then and there lands of the United States, chiefly valuable for the deposits of coal therein, situate within said land district, and open to entry and purchase as coal lands at the said land office, under the laws of the United States relating to the entry and sale of coal lands, and the rules and regulations then in force, which had theretofore been made under authority of said laws, by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, and the said lands were then of large

acreage, to wit, of more than three thousand five hundred acres, and of great value, to wit, of the value of one hundred and fifty thousand dollars, and upwards, and then and there consisted of divers parcels and tracts of coal lands in said land district, a further description whereof is to said grand jurors unknown, and also and especially of the following-described tracts and parcels of coal land in said land district, to wit:

1. A certain parcel of said coal land hereinafter designated and intended by the designation "Parcel number 1," and described as follows, to wit: The northeast quarter of section twelve of township thirty-two north of range twelve west of the New Mexico principal meridian.

2. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 2,"
6 described as follows, to wit: The northwest quarter of the northwest quarter of section twenty-four of said township thirty-two north, and the west half of the southwest quarter of section thirteen of said township, and the northeast quarter of the southeast quarter of section fourteen of said township.

3. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 3," and described as follows, to wit: The northwest quarter of section twelve of said township thirty-two north of said range twelve west of the New Mexico principal meridian.

4. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 4," and described as follows, to wit: Lots one and two of section twenty-three of said township thirty-two north, and the southeast quarter of the northeast quarter of said last-mentioned section twenty-three, and the southwest quarter of the northwest quarter of section twenty-four of said last-mentioned township.

5. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 5," and described as follows, to wit: The southeast quarter of the southeast quarter of section fourteen of said township thirty-two north, and the
7 north half of the northeast quarter of section twenty-three of said township thirty-two north, and the southwest quarter of the northeast quarter of said last-mentioned section twenty-three.

6. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 6," and described as follows, to wit: The southwest quarter of the southwest quarter of section twelve of said township thirty-two north, and the west half of the northwest quarter of section thirteen of said last-mentioned township, and the northeast quarter of the northeast quarter of section fourteen of said last-mentioned township.

7. A certain other parcel of said coal land hereinafter designated and intended by the designation "parcel number 7," and described as follows, to wit: The east half of the northwest quarter of section thirteen of said township thirty-two north, and the east half of the

southwest quarter of section twelve of said last-mentioned township thirty-two north.

8. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 8," and described as follows, to wit: The east half of the southeast quarter of section eleven of said township thirty-two north, and the southeast quarter of the northeast quarter of said last-mentioned section eleven
8 and the northwest quarter of the southwest quarter of section twelve of said last-mentioned township.

9. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 9," and described as follows, to wit: The south half of the northeast quarter of section fourteen of said last mentioned township, and the west half of the southeast quarter of said last mentioned section.

10. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 10," and described as follows, to wit: The west half of section sixteen of township thirty-five north of range ten west of the said principal meridian.

11. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 11," and described as follows, to wit: The northeast quarter of section seventeen of township thirty-five north of range ten west of said principal meridian, and the north half of the southeast quarter of said last mentioned section seventeen, and lots one, two, and seven of section eight of said last mentioned township.

12. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 12," and described as follows, to wit: Lots four and five of section eight
9 of the last mentioned township, and the west half of the northwest quarter of section seventeen of said last mentioned township, and the northwest quarter of the southwest quarter of said last mentioned section seventeen.

13. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 13," and described as follows, to wit: Lots three and six of section eight of said last mentioned township, and the east half of the northwest quarter of said last mentioned section seventeen thereof, and the east half of the southwest quarter of said last mentioned section seventeen, and the south half of the southeast quarter of said last mentioned section seventeen, and the northeast quarter of the northwest quarter of section twenty of said last mentioned township.

14. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 14," and described as follows, to wit: The southeast quarter of section sixteen of said last mentioned township, and the south half of the northeast quarter of said last mentioned section sixteen, and the northwest quarter of the northeast quarter of said last mentioned section sixteen.

10 15. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 15,"

and described as follows, to wit: Lots seven and eight of section seven of said last mentioned township thirty-five north, and the east half of the northeast quarter of section eighteen of said last mentioned township, and the east half of the southeast quarter of said last mentioned section eighteen, and the southwest quarter of the southwest quarter of section seventeen of said last mentioned township, and the northwest quarter of the northwest quarter of section twenty of said last mentioned township, and the northeast quarter of the northeast quarter of section nineteen of said last mentioned township.

16. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 16," and described as follows, to wit: The southwest quarter of the northwest quarter of section thirteen of said last mentioned township thirty-five north, and the northwest quarter of the southwest quarter of said last mentioned section thirteen, and the northeast quarter of the southeast quarter of section fourteen of said last mentioned township.

17. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 17," and described as follows, to wit: The south half of the northeast
11 quarter of said last mentioned section fourteen in said last mentioned township thirty-five north.

18. A certain other parcel of said coal land hereinafter designated and intended by the designation "Parcel number 18," and described as follows, to wit: The east half of the southwest quarter of section eleven of said last mentioned township thirty-five north.

And the said defendants and their said coconspirators, in and by the said criminal conspiracy, unlawfully, wickedly, and maliciously conspired and agreed together and intended that certain persons, to wit: Everett Fields, Ida E. Jarvis, John H. Swire, George A. Shreck, Sherman S. Howe, Alex. Hart, Charles Carter, Homer Fields, Maud E. Fields, John W. Waters, Arthur J. Bagby, Emma Smith, Belle Dominic, John M. Wigglesworth, Maggie L. Smith, Gussie Wilkerson, James H. Arnold, Effie E. DeLuche, Ada Hubler, James Baker, William C. Rudersdorf, Joseph A. Clark, and other persons to the grand jurors unknown, all of whom, known and unknown, are hereinafter designated and intended by the term "entrymen," should, by cunning persuasion and promises of pecuniary reward and other means to said grand jurors unknown, be severally and respectively induced and procured as follows, to wit: The said Everett Fields, Ida
E. Jarvis, John H. Swire, George A. Shreck, Sherman S.
12 Howe, Alex. Hart, Charles Carter, Homer Fields, and Maud E. Fields, respectively, by and through the said Stephen Monroe Fields, the said John W. Waters, Arthur J. Bagby, Emma Smith, Belle Dominic, John M. Wigglesworth, Maggie L. Smith, Gussie Wilkerson, James H. Arnold, Effie E. DeLuche, and Ada Hubler, respectively, by and through the said Joseph W. Dobbins, Robert S. Clements, John J. McKinnon, and Thomas L. Loftus; and the said James Baker and Joseph A. Clark, respectively, by and through the said defendant and agent George C. Franklin; and the said William

C. Rudersdorf by and through the said agent George W. Franklin, and the said unknown entrymen, respectively, by and through certain other agents and coconspirators of the defendants to the said jurors unknown—to make in the respective names of them, the said entrymen, fraudulent applications to purchase and fraudulent final entries of the said coal lands, at the said land office, and to sign, execute, and verify, and cause to be filed in said land office, each as to the particular application and entry so to be made in his name, all and singular the written documents, papers, and proofs, which by said rules and regulations were then required to be so made and filed by all persons making final entry of such lands, including in the case of each of such entries so to be made by said entrymen, a writing in the form of an affidavit, signed by such entryman making such
13 entry, and purporting to have been sworn to by him before some officer authorized to administer oaths in such cases, wherein it would be falsely stated and represented, among other things, that such entryman was making such entry for his own use and benefit, and not directly or indirectly for the use or benefit of any other person; whereas in truth and in fact he would not be making such entry for his own use and benefit but consciously and intentionally for the use and benefit of such beneficiary as would be designated to him under and in pursuance of that one of the fraudulent antecedent agreements hereinafter described which, previously to such entry, would have been made by such entryman as hereinafter designated, as such entryman and the defendants and their said coconspirators in the case of each such entry, at the time of and before the making thereof, would well know; each and every of which said fraudulent applications and entries would be made under and in pursuance of a secret and fraudulent antecedent agreement and understanding, in each and every such case, between the particular entryman so making such application and entry and such of the said agents as would so procure and induce the making of such application and entry, in and by each of which agreements and understandings it would be agreed and promised, on the part of such of the said agents as would so be therein participating, that all the expense of
14 the making of such entry, including the purchase price required by said laws and regulations to be paid at said land office to the United States for the land embraced in such entry, would be advanced and paid through the procurement of such of the said agents as would be participating as aforesaid in such agreement, without recourse to such entryman, and on the part of such entryman that such application and entry so to be made in his name would not be for his own use and benefit, but for the use and benefit of such beneficiary as such of the said agents as would so be participating in such agreement as aforesaid might designate, and in and by each of which such secret agreements it would be further agreed by such entryman so making the same that he, such entryman, would at any time, at the request of such of the said agents as would so be participating in such agreement, execute a deed of conveyance convey-

ing the parcel of coal land so to be embraced in his, such entryman's, entry, to such person as might be designated to him by such of the said agents as would so be participating in such agreement. And in and by their said unlawful and wicked conspiracy, the said defendants and their said coconspirators unlawfully, maliciously, and corruptly designed and intended that by means of such inducements and procurements aforesaid, and under and in pursuance of such fraudulent antecedent agreements, so to be induced and
15 procured as aforesaid, the said coal lands should be finally entered at the said land office by the said entrymen respectively, as follows, to wit: The said parcel numbered one by the said Everett Fields, the said parcel number two by the said Ida E. Jarvis, the said parcel number three by the said John H. Swire, the said parcel number four by the said George A. Shreck, the said parcel number five by the said Sherman S. Howe, the said parcel number six by the said Alex. Hart, the said parcel number seven by the said Charles Carter, the said parcel number eight by the said Homer Fields, the said parcel number nine by the said Maud E. Fields, the said parcel number ten by the said John W. Waters and Arthur J. Bagby together as an association, the said parcel number eleven by the said Emma Smith and Belle Dominic together as an association, the said parcel number twelve by the said John M. Wigglesworth, the said parcel number thirteen by the said Maggie L. Smith together with the said Robert S. Clements as an association, the said parcel number fourteen by the said Gussie Wilkerson and James H. Arnold together as an association, the said parcel number fifteen by the said Effie E. DeLuche and Ada Hubler together as an association, the said parcel number sixteen by the said James Baker, the said parcel number seventeen by the said William C. Rudersdorf, the said parcel number eighteen by the said Joseph A. Clark, and the said
16 other coal lands, whereof the descriptions are to the said jurors unknown, in separate parcels by the said unknown entrymen respectively; and that the said Robert S. Clements should join and cooperate as an entryman with the said Maggie L. Smith in the making as aforesaid of such aforesaid entry of said parcel number thirteen; and that in and for the making of such entries aforesaid, moneys of said the Calumet Fuel Company and of certain of the said conspirators to the said jurors unknown, equal to the sum of the several fees required to be paid at the said land office in the entry of said lands as coal lands, and the several purchase prices of the said lands, as such prices were then respectively fixed by the said laws, rules, and regulations, should be procured by the said defendants, and be paid to the receiver of the said land office, in the several respective amounts and at the several respective times required for the making of such aforesaid entries respectively and seriatim, in the guise and appearance in the case of each such entry of moneys of the said respective entrymen so making the same, and in part as moneys of the said Robert S. Clements in the case of such intended entry of said parcel number thirteen, and as though such several amounts of money

were being tendered and paid to the said receiver by and in the interest of such entrymen respectively (including the said Robert S. Clements as to said parcel number thirteen) in the bona fide
17 entry and purchase under said laws, rules, and regulations of the said respective parcels of coal land so to be by said entrymen respectively (including the said Robert S. Clements as to said parcel number thirteen) applied for; that by means of such fraudulent payments aforesaid and by means of the aforementioned documents, proofs, and writings in form of affidavits, and the statements to be therein contained as aforesaid, the said register and receiver, and each of them, relying on such documents, proofs, writings, and statements should be deceived into the false belief that the said entries, and each of them, were entries applied for in good faith by the said respective entryman (including the said Robert S. Clements as to said parcel number thirteen), each for his own use and benefit, and not directly or indirectly for the use or benefit of any other person, and should respectively thereupon, because of such false belief and in reliance upon and induced by said documents, proofs, and writings, respectively, and the statements and representations thereof, respectively, issue to and in the names of the said respective entrymen (including said Robert S. Clements as to said parcel number thirteen) receiver's receipts for such respective payments of purchase money, and register's final certificates of the final entries by said entrymen respectively (including said Robert S. Clements as to said parcel
18 number thirteen) of the said coal lands, according to the several and respective amounts and descriptions and locations of the respective parcels of land so to be embraced in their respective entries as aforesaid; and that thereupon the Commissioner of the General Land Office of the United States, upon receiving notice of the making of such final entries, respectively, and upon examination of the aforesaid documents, proofs, writings, and statements pertaining thereto, respectively, all in the regular course of his official duty, should in like manner be thereby induced into the false belief that such entries, and each thereof, had been made in good faith by such entrymen, respectively (including said Robert S. Clements as to said parcel number thirteen), for the use and benefit of the respective entrymen (including said Robert S. Clements as to said parcel number thirteen) so making the same, and not directly or indirectly for the use or benefit of any other person or persons, and should thereupon, because of such belief and relying thereon as true, cause patents for such lands so entered to be issued by the United States to the said entrymen, respectively (including said Robert S. Clements as to said parcel number thirteen), for the said coal lands, according to the amounts, descriptions, and locations of the respective parcels thereof so to be embraced in their respective entries as aforesaid; and that each of the said entrymen, as soon as
19 practicable after the making of the fraudulent entry so to be made by him in manner and form as aforesaid, should be requested, induced, and procured to execute and deliver a deed purport-

ing and intended by such entryman so executing and delivering the same to convey the particular parcel of the said coal lands included in such entry so made by such grantor entryman to some person named as grantee thereof in such deed; that the persons who would so be named in such deeds as grantees, respectively, would be selected by the defendants to act as such and would be in some instances chosen from among the defendants themselves and would in other instances be such other persons as the defendants from time to time might decide upon, and whose conduct the defendants would be able, with the assistance whenever convenient of some one of the said agents, to control in the matter of the further conveyance of any and all of the said parcels of land so to be conveyed by such aforesaid deeds; that the execution of each such deed aforesaid would be procured by, and the delivery thereof by such grantor entryman would be made according to the directions of, such of the said agents as would have procured such entryman to make entry as aforesaid of the land by such deed so to be conveyed as aforesaid; that in respect of each of the said unknown entrymen, and also in respect of each of the
20 said entrymen above named and designated as such, the said deeds, respectively, and the execution and delivery of each thereof, respectively, by said respective entrymen, were to be so induced and procured as aforesaid under and in pursuance of the aforedescribed fraudulent antecedent agreements, respectively, and that each of such deeds aforesaid would be finally delivered into the custody of the defendants with the knowledge and consent of such grantee so therein to be named as aforesaid; and that the said Robert S. Clements should also execute and deliver to such person as the defendants might designate to him, as soon as practicable after the entry at said land office of said parcel number thirteen, in manner and form as aforesaid, a deed of conveyance purporting, and by the said Clements intended, to convey the said parcel number thirteen; and that by means of divers other deeds of conveyance, to be prepared by the said defendants in cooperation with the said coconspirators, and to be executed and delivered respectively by such aforesaid respective grantees of the said respective entrymen and of the said Robert S. Clements, respectively, and to be so executed and delivered through the procurement of and in such manner, at such times, and in such terms as would be determined by the defendants and their said coconspirators; and by the further means of divers other mesne conveyances the terms whereof would be determined and the execution and delivery whereof procured and devised from time to
21 time by the said defendants and their said coconspirators in such wise as to them, to wit, the said defendants and their said coconspirators, might seem most effective for the secret and complete accomplishment of the aforesaid object and purpose of the said conspiracy, all of the said coal lands, described and undescribed, should finally be conveyed fraudulently, and solely by means of such aforesaid intended operation of the said malicious and corrupt conspiracy, to the Calumet Fuel Company aforesaid, and that thereupon that

corporation should enter upon the said lands fraudulently claiming them as its own and unlawfully, fraudulently, corruptly, and wickedly use and enjoy the same and extract and dispose of the coal thereon to the great damage and loss of the United States and the people thereof.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in pursuance of and to effect the object of the same, the said Stephen Monroe Fields did, unlawfully and corruptly, at the request of the said Robert Forrester, on, to wit, the thirtieth day of August, in the year last aforesaid, file in the said land office, with the said register and receiver thereof, a certain
22 document in writing, signed by the said Everett Fields and in substance as follows, to wit:

I, Everett Fields, claiming under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, the right of purchase to the NE. ¼ of sec. 12 in township 32 N., of range 12 W., N. M. P. M., subject to sale at Durango, Colo., do solemnly swear that I have never had the right of purchase under the aforesaid provisions of the law either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing coal mines on said tract, in labor and improvements, the sum of fifteen ($15.00) dollars, the nature of such improvements being as follows: Tunnel ten feet long and other prospecting; that I am now in the actual possession of said mines, and make the entry for my own use and benefit and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal; that there is not to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

EVERETT FIELDS.

Subscribed and sworn to before me this 28th day of August, A. D. 1905.

L. G. EBLEN,
Probate Clerk, San Juan Co., N. M.

which said last mentioned document was so filed as aforesaid by the said Stephen Monroe Fields as the attorney in fact for
23 the said Everett Fields, thereunto by the said Everett Fields authorized; upon which document when so filed was affixed

the seal of the probate court of the county of San Juan, in the Territory of New Mexico.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in pursuance of and to effect the object of the same, the said Stephen Monroe Fields did, unlawfully and corruptly, at the request of the said Robert Forrester, on, to wit, the thirtieth day of August, in the year last aforesaid, file in the said land office, with the said register and receiver thereof, a certain document in writing, signed by the said Ida E. Jarvis and in substance as follows, to wit:

I, Ida E. Jarvis, claiming under the Revised Statutes, relating to the sale of coal lands of the United States, the right of purchase to the NW. ¼ NW. ¼ sec. 24, W. ½ SW. ¼ 13, & NE. ¼ SE. ¼ sec. 14, in township 32 N., of range 12 W., N. M. P. M., subject to sale at Durango, Colo., do solemnly swear that I have never had the right of purchase under the aforesaid provisions of the law either as individual or as the member of an association, and that I have never held other lands under its provisions; I further swear that I
24 have expended in developing coal mines on said tract, in labor and improvements, the sum of fifteen ($15.00) dollars, the nature of such improvements being as follows: Tunnel ten feet long and shaft five feet deep; that I am now in the actual possession of said mines, and make the entry for my own use and benefit and not direct nor indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land and with each and every subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

IDA E. JARVIS.

Subscribed and sworn to before me this 28th day of August, A. D. 1905.

L. G. EBLEN,
Probate Clerk, San Juan Co., N. M.

which said last mentioned document was so filed as aforesaid by the said Stephen Monroe Fields as the attorney in fact for the said Ida E. Jarvis thereunto by the said Ida E. Jarvis authorized; upon
25 which document when so filed was affixed the seal of the probate court of the county of San Juan, in the Territory of New Mexico.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in pursuance of and to effect the object of the same, the said Stephen Monroe Fields did, unlawfully and corruptly, at the unlawful and corrupt request of the said Robert Forrester, on, to wit, the thirtieth day of August, in the year last aforesaid, file in the said land office, with the said register and receiver thereof, a certain document in writing, signed by the said Sherman S. Howe, and in substance as follows:

I, Sherman S. Howe, claiming under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States the right of purchase to the SE. ¼ SE. ¼ sec. 14, N. ½ NE. ¼ & SW. ¼ NE. ¼ sec. 23, in township 32 N. of range 12 W., N. M. P. M., subject to sale at Durango, Colo., do solemnly swear that I have never had the right of purchase under the aforesaid prosions of law, either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing mines on said tract, in labor and improvements, the sum of twenty ($20.00) dollars, the nature of such improvements being as follows: Shaft 4 by 6 feet and 7 feet deep in solid coal and other prospecting; that I am now in actual possession of said mines, and make the entry for my own use and benefit, and not directly for the use and benefit of any other
26 party; I do, furthermore, swear that I am well acquainted with the character of said described land, and with each and every subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

SHERMAN S. HOWE.

Subscribed and sworn to before me this 28th day of August, A. D. 1905.

L. G. EBLEN,
Probate Clerk, San Juan County, N. M.

which said last mentioned document was so filed as aforesaid by the said Stephen Monroe Fields as the attorney in fact for the said Samuel S. Howe thereunto by the said Samuel S. Howe authorized; upon which document when so filed was affixed the seal of the probate court of the county of San Juan, in the Territory of New Mexico.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in pursuance of and to effect the object of the same, the said Stephen Monroe Fields, unlawfully and corruptly, did, at the request and suggestion of the said Robert Forrester, and
27 on, to wit, the thirtieth day of August, in the year of our Lord nineteen hundred and five, borrow and procure from the First National Bank of Durango, at the city of Durango aforesaid, the sum of sixty-four hundred dollars in money for the purpose of causing the same to be paid in portions of sixteen hundred dollars each to the said receiver at the said land office for the final entry and purchase in pursuance of said conspiracy, by and in the names of the said Everett Fields, Ida E. Jarvis, John H. Swire, and Sherman S. Howe, severally and respectively, of the said parcels of the said coal lands hereinbefore designated as parcel number 1, parcel number 2, parcel number 3, and parcel number 5, respectively.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance of and to effect the object of the same, the said Stephen Monroe Fields unlawfully and corruptly and at the unlawful and corrupt request of the said Robert Forrester, did, on, to wit, the thirtieth day of August, in the year last aforesaid, at Durango aforesaid, furnish and deliver to the said John H. Swire sixteen hundred dollars in money, and instruct the said John H. Swire to pay and deliver the same to the said receiver at the said land office in connection with and for the purpose of the making by and in the name of the said John H. Swire of the
28 final entry and purchase as coal lands of the said parcel of coal lands hereinbefore described and designated as parcel number 3.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Robert Forrester and Benjamin N. Freeman unlawfully and corruptly did furnish to the said Stephen Monroe Fields, on, to wit, the twelfth day of September, in the year last aforesaid, at Durango aforesaid, sixty-five hundred dollars in money for use in the making of certain of the said fraudulent entries so intended to be made as aforesaid in the effectuation of the said conspiracy; but the jurors aforesaid do not know, and so can not and do not here designate, either the specific entries, or any thereof, for the making of which such last mentioned sum was to be so used, or the manner in which the same was to be so used, save that the same was to be used and employed in part to pay, at said land office, the respective purchase prices required by said laws and regulations to be there paid in the making of such entries, and in part in the

defrayal of other expenses attending the making thereof, a
29 more particular description whereof is to said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance of and to effect the object of the same, the said Stephen Monroe Fields unlawfully and corruptly and at the unlawful and corrupt request of the said Robert Forrester, did, on, to wit, the thirtieth day of August, in the year last aforesaid, at Durango aforesaid, furnish and deliver to the said George A. Shreck sixteen hundred four and 90/100 dollars in money, and instruct the said George A. Shreck to pay and deliver the same to the said receiver at the said land office in connection with and for the purpose of the making by and in the name of the said George A. Shreck of the final entry and purchase as coal lands of the said parcel of coal lands hereinbefore described and designated as Parcel number 4.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof, and to effect the object of the same, the said Stephen Monroe Fields unlawfully and
30 corruptly and at the unlawful and corrupt request of the said Robert Forrester, did, on, to wit, the twenty-first day of September, in the year last aforesaid, at Durango aforesaid, procure the said John W. Swire to go before the said register and receiver in said land office, as the attorney in fact of the said Alex Hart, and there file in said land office with said register and receiver, as such attorney in fact thereunto authorized, a certain document in writing theretofore signed by the said Alex Hart, and in substance as follows:

I, Alex Hart, claiming under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, the right of purchase to the SW. ¼ SW. ¼ sec. 12, W. ½ NW. ¼ sec. 13, & NE. ¼ NE. ¼ sec. 14, in township 32 N., of range 12 W., N. M. P. M., subject to sale at Durango, Colo., do solemnly swear that I have never had the right of purchase under the aforesaid provisions either as an individual or as member of an association, and that I have never held any other lands under its provisions. I further swear that I have expended in developing coal mines on said tract, in labor and improvements, the sum of fifteen ($15.00) dollars, the nature of such improvements being as follows: Tunnel 25 feet long; that I am now in actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit for any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly

valuable for coal; that there is not to my knowledge, within the limits thereof any vein *of* lode *or* quartz or other rock in place
31 bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, or copper. So help me God.

ALEX. HART.

Subscribed and sworn to before me this 28th day of August, A. D. 1905.

L. G. EBLEN,
Probate Clerk, San Juan Co., N. M.

upon which last mentioned document when so filed was affixed the seal of the said probate court.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Stephen Monroe Fields unlawfully and corruptly and at the unlawful and corrupt request of the said Robert Forrester, did, on, to wit, the twenty-first day of September, in the year last aforesaid, at Durango aforesaid, procure the said John H. Swire to go before the said register and receiver of said land office, as the attorney in fact of the said Charles Carter, and there file in said land office with said register and receiver, as such attorney in fact thereunto authorized, a certain document in writing theretofore signed by the said Charles Carter, and in substance as follows:

I, Charles Carter, claiming under the Revised Statutes of
32 the United States relating to the sale of coal lands of the United States, the right of purchase to the E. ½ NW. ¼ sec. 13, and E. ½ SW. ¼ sec. 12, in township 32 north, of range 12 W., N. M. P. M., subject to sale at Durango, Colo., do solemnly swear that I have never had the right of purchase under the aforesaid provisions of law, either as an individual or a member of an association, and that I have never held any other lands under its provisions. I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of twenty ($20) dollars, the nature of such improvements being as follows: Tunnel twenty feet long; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock

in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

CHAS. CARTER.

Subscribed and sworn to before me this 28th day of August, A. D. 1905.

L. G. EBLEN,
Probate Clerk, San Juan County, N. M.

upon which last mentioned document when so filed was affixed the seal of the said probate court.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

33 That after the formation of said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Stephen Monroe Fields unlawfully and corruptly and at the unlawful and corrupt suggestion of the said Robert Forrester, did, on, to wit, the fourteenth day of September, in the year last aforesaid, appear before the said Receiver in the said land office at Durango aforesaid, and there subscribe, in the name of "Monroe Fields," and make oath to, before the said receiver, a certain affidavit in substance as follows, to wit:

I, Monroe Fields, Aztec, New Mexico, on oath swear that I am well acquainted with the E. ½ SE. ¼ and SE. ¼ NE. ¼ sec. 11 and NW. ¼ SW. ¼ of section 12, in township 32 N. of range 12 W., N. M. P. M., in the district of lands subject to sale at the Land office at Durango, Colorado, and containing one hundred and sixty acres.

That I am well acquainted with the character of the said described land and with each and every subdivision thereof, having frequently passed over the same.

That my knowledge of said land is such as to enable me to testify understandingly with regard thereto. That said lands contain large deposits of coal and are chiefly valuable therefor. That there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper. That there is not within the limits of said land to my knowledge any valuable deposits of gold, silver or copper. That said lands are not within fifteen miles of a completed railroad.

MONROE FIELDS.

Subscribed and sworn to before me this day of September, A. D. 1905.

34 D. L. SHEETS, *Receiver.*

and then and there file the same in said land office, which last mentioned affidavit was so then and there made and filed by the said Stephen Monroe Fields for the purpose of assisting in the making of final entry and purchase of said parcel of coal lands above described and designated as Parcel number 8, in the name of said

Homer Fields and in pursuance of said unlawful and corrupt conspiracy.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Stephen Monroe Fields unlawfully and corruptly and at the unlawful and corrupt suggestion of the said Robert Forrester, did, on, to wit, the fourteenth day of September, in the year last aforesaid, appear before the said receiver in the said land office at Durango aforesaid, and there subscribe, in the name of "Monroe Fields," and make oath to, before the said receiver, a certain affidavit in substance as follows, to wit:

I, Monroe Fields, on oath swear that I am well acquainted with the S. ½ NE. ¼ and the W. ½ SE. ¼ of section number 14, in Township 32 north of range 12 west, N. M. P. M., in the district
35 of lands subject to sale at the land office at Durango, Colorado, and containing one hundred and sixty (160) acres.

That I am well acquainted with the character of the said described land and with each and every subdivision thereof, having frequently passed over the same.

That my knowledge of said land in such as to enable me to testify understandingly with regard thereto. That said lands contain large deposits of coal and are chiefly valuable therefor. That there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper. That there is not within the limits of said land to my knowledge any valuable deposits of gold, silver, or copper. That said lands are not within fifteen miles of a completed railroad.

MONROE FIELDS.

Subscribed and sworn to before me this 14 day of September, A. D. 1905.

D. L. SHEETS, *Receiver.*

and then and there file the same in said land office, which last mentioned affidavit was so then and there made and filed by the said Stephen Monroe Fields for the purpose of assisting in the making of final entry and purchase of said parcel of coal lands above described and designated as Parcel number 9, in the name of said Maud E. Fields and in pursuance of said unlawful and corrupt conspiracy.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in pursuance of and to effect the
36 object of the same, the said Robert Forrester unlawfully, maliciously, and corruptly, at Durango aforesaid, on, to wit, the first day of September, in the year last aforesaid, did furnish to

the said Stephen Monroe Fields the sum of three hundred dollars in money for the purpose of defraying, through the agency and instrumentality of the said Stephen Monroe Fields, certain expenses incident to the making of certain of said fraudulent entries in pursuance of said unlawful and corrupt conspiracy, a further description of which last mentioned expenses and of the entries, or any thereof, concerning which the said last mentioned three hundred dollars was so intended to be used, is to said grand jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in pursuance of and to effect the object of the same, the said Robert Forrester and the said Benjamin N. Freeman, on, to wit, the twenty-first day of September, in the year last aforesaid, at Durango aforesaid, did unlawfully, maliciously, and corruptly furnish to the said Stephen Monroe Fields the sum of thirty-two hundred dollars in money for use in the making of certain of the said fraudulent entries so intended to be made as aforesaid in the
37 effectuation of the said conspiracy; but the jurors aforesaid do not know, and so can not and do not here designate, either the specific entries, or any thereof, for the making of which such last mentioned sum was to be so used, or the manner in which the same was to be so used, save that the same was to be used and employed in part to pay, at said land office, the respective purchase prices required by said laws and regulations to be there paid in the making of such entries, and in part in the defrayal of other expenses attending the making thereof, a more particular description whereof is to said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in further pursuance of and to effect the object of the same, the said Stephen Monroe Fields unlawfully and corruptly, at the unlawful and corrupt request of the said Robert Forrester, did, on, to wit, the seventeenth day of October, in the year last aforesaid, at Aztec, in the county of San Juan and Territory of New Mexico, request and procure the said Everett Fields to execute, as grantor, and deliver into the custody of him, the said Stephen Monroe Fields, a certain quit-claim deed purporting and intended by the said Everett Fields to convey to the said John H. Swire that parcel of the said coal lands which is hereinbefore designated as parcel number
38 one, which last-mentioned deed has since been recorded and is now of record in the office of the county clerk and recorder of the county of La Plata, in the said State of Colorado, in book 114 of the records of deeds of said office, beginning at page 84 of said book, a further description of which last-mentioned deed is to the said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in further pursuance of and to effect the object of the same, the said Stephen Monroe Fields unlawfull' and corruptly, at the unlawful and corrupt request of the said Robert Forrester, did, on, to wit, the twenty-ninth day of September, in the year last aforesaid, at Aztec aforesaid, request and procure the said Ida E. Jarvis to execute, as grantor, and deliver into the custody of him, the said Stephen Monroe Fields, a certain quit-claim deed purporting and intended by the said Ida E. Jarvis to convey to the said George A. Shreck that parcel of the said coal lands which is hereinbefore designated as parcel number two, which last-mentioned deed has since been recorded and is now of record in the office of the county clerk and recorder of the county of La Plata, in the said State of Colorado, in book 114 of the records of deeds of said office, beginning at page 80 of said book, a further descrip-
39 tion of which last-mentioned deed is to the said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in further pursuance of and to effect the object of the same, the said Stephen Monroe Fields unlawfully and corruptly, at the unlawful and corrupt request of the said Robert Forrester, did, on, to wit, the twenty-ninth day of September, in the year last aforesaid, at Aztec aforesaid, request and procure the said Sherman S. Howe to execute, as grantor, and deliver into the custody of him, the said Stephen Monroe Fields, a certain quitclaim deed purporting and intended by the said Sherman S. Howe to convey to the said George A. Shreck that parcel of the said coal lands which is hereinbefore designated as Parcel number 5, which last-mentioned deed has since been recorded and is now of record in the office of the county clerk and recorder of the county of La Plata, in the said State of Colorado, in book 114 of the records of deeds of said office, beginning at page 77 of said book, a further description of which last-mentioned deed is to the said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in further pursuance of and to effect the object
40 of the same, the said Stephen Monroe Fields unlawfully and corruptly, at the unlawful and corrupt request of the said Robert Forrester, did, on, to wit, the 29th day of September, in the year last aforesaid, at Aztec aforesaid, request and procure the said Alex. Hart to execute, as grantor, and deliver into the custody of him, the said Stephen Monroe Fields, a certain quitclaim deed purporting and intended by the said Alex. Hart to convey to the said

John H. Swire that parcel of the said coal lands which is hereinbefore designated as Parcel number 6, which last mentioned deed has since been recorded and is now of record in the office of the county clerk and recorder of the county of La Plata, in the said State of Colorado, in book 114 of the records of deeds of said office, beginning at page 35 of said book, a further description of which last mentioned deed is to the said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in further pursuance of and to effect the object of the same, the said Stephen Moroe Fields unlawfully and corruptly, at the unlawful and corrupt request of the said Robert Forrester, did, on, to wit, the 29th day of September, in the year last aforesaid, at Aztec aforesaid, request and procure the said Charles Carter to
41 execute, as grantor, and deliver into the custody of him, the said Stephen Monroe Fields, a certain quitclaim deed purporting and intended by the said Charles Carter to convey to the said John H. Swire that parcel of the said coal lands which is hereinbefore designated as parcel number 7, which last mentioned deed has since been recorded and is now of record in the office of the county clerk and recorder of the county of La Plata, in the said State of Colorado, in book 114 of the records of deeds of said office, beginning at page 82 of said book, a further description of which last mentioned deed is to the said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in further pursuance of and to effect the object of the same, the said Stephen Monroe Fields unlawfully and corruptly, at the unlawful and corrupt request of the said Robert Forrester, did, on, to wit, the 29th day of September, in the year last aforesaid, at Aztec aforesaid, request and procure the said Maud E. Fields to execute, as grantor, and deliver into the custody of him the said Stephen Monroe Fields a certain quit-claim deed purporting and intended by the said Maud E. Fields to convey to the said George A. Shreck that parcel of the said coal lands which is hereinbefore designated as Parcel number 9, which last mentioned deed has
42 since been recorded and is now of record in the office of the county clerk and Recorder of the county of La Plata, in the said State of Colorado, in book 114 of the records of deeds of said office, beginning at page 79 of said book, a further description of which last mentioned deed is to the said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in further pursuance of and to effect the object of the same, the said Stephen Monroe Fields unlawfully and corruptly, at the unlawful and corrupt request of the said Robert Forrester, did,

on, to wit, the sixteenth day of October, in the year last aforesaid, at Aztec aforesaid, request and procure the said Homer Fields to execute, as grantor, and deliver into the custody of him the said Stephen Monroe Fields a certain quitclaim deed purporting and intended by the said Homer Fields to convey to the said John H. Swire that parcel of the said coal lands which is hereinbefore designated as parcel number eight, which last mentioned deed has since been recorded and is now of record in the office of the county clerk and Recorder of the county of La Plata, in the said State of Colorado, in book 114 of the records of deeds of said office, beginning at page 83 of said book, a further description of which last
43 mentioned deed is to the said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in further pursuance thereof and to effect the object of the same, the said Robert Forrester and William H. Bird, on, to wit, the sixteenth day of October, in the year last aforesaid, at Durango aforesaid, unlawfully, maliciously and corruptly did prepare and deliver to the said Stephen Monroe Fields, for execution by the said John H. Swire as grantor, a writing purporting to be the draft of a quitclaim deed which when so executed would purport to convey to the said Otis B. Spencer certain of the said parcels of the said coal lands hereinabove described, to wit: the said southeast quarter of the northeast quarter of said section number eleven of said township number thirty-two north of said range twelve west of said New Mexico principal meridian; and the said east half of the southeast quarter of said last mentioned section eleven; and the said northwest quarter of section twelve of said last named township; and the said northeast quarter and the southwest quarter of said last mentioned section twelve; and the said northwest quarter of said section number thirteen of said last mentioned township; and the northeast
44 quarter of the northeast quarter of said section number thirteen of said last mentioned township; a further description of which last mentioned writing is to said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in further pursuance thereof and to effect the object of the same, the said Robert Forrester and William H. Bird, on, to wit, the twentieth day of October, in the year last aforesaid, at Durango aforesaid, unlawfully, maliciously and corruptly did prepare and deliver to the said Stephen Monroe Fields, for execution by the said George A. Shreck as grantor, a writing purporting to be the draft of a quitclaim deed which when so executed would purport to convey to the said Otis B. Spencer certain of the said parcels of the said coal lands hereinabove described, to wit: the said west half of the southwest quarter of said section number thirteen of said township number thirty-two north of said range twelve west of said New Mexico principal meridian; the said south half of the northeast

quarter of said section number fourteen of said last mentioned township; the said southeast quarter of said last mentioned section fourteen; the said northeast quarter of said section number twenty-
45 three of said last mentioned township; the said lots one, two, three and four of said last mentioned section twenty-three, and the said west half of the northwest quarter of said section number twenty-four of said last mentioned township; a further description of which last mentioned writing is to said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful and corrupt conspiracy and in pursuance thereof and to effect the object of the same, the said Stephen Monroe Fields unlawfully and corruptly, at the unlawful and corrupt instigation and request of the said Robert Forrester, Benjamin N. Freeman and Otis B. Spencer, did, on, to wit, the seventeenth day of October, in the year last aforesaid, at Aztec in the Territory of New Mexico, procure the said John H. Swire to sign, execute, and deliver to him, the said Stephen Monroe Fields, a certain quitclaim deed purporting to convey to the said Otis B. Spencer certain of the said parcels of the said coal lands hereinabove described, to wit: the said southeast quarter of the northeast quarter of said section number eleven of said township number thirty-two north of said range twelve west of said New Mexico principal meridian; and the said east half of the southeast quarter of said last men-
46 tioned section eleven; and the said northwest quarter of section twelve of said last named township; and the said northeast quarter and the southwest quarter of said last mentioned section twelve; and the said northwest quarter of said section number thirteen of said last mentioned township; and the northeast quarter of the northeast quarter of said section number fourteen of said last mentioned township; a more particular description of which said last mentioned deed is to the said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in further pursuance thereof and to effect the object of the same, the said Stephen Monroe Fields, at the unlawful and corrupt request and suggestion of the said Robert Forrester, Benjamin N. Freeman and Otis B. Spencer, did, on, to wit, the twenty-first day of October, in the year last aforesaid, at Durango aforesaid, unlawfully and corruptly deliver to the said Benjamin N. Freeman, and the said Benjamin N. Freeman, in further pursuance of and to effect the object of the said unlawful and corrupt conspiracy, did then and there unlawfully and corruptly receive from him the said Stephen Monroe Fields a certain quitclaim deed theretofore executed by the said George A. Shreck and one Annie Shreck, his wife, as grantors, and purporting to convey to the said Otis B. Spencer certain of
47 the said lands hereinbefore described, to wit: the said west half of the southwest quarter of said section number thirteen of

said township number thirty-two north of said range twelve west of said New Mexico principal meridian; the said south half of the northeast quarter of said section number fourteen of said last mentioned township; the said southeast quarter of said last mentioned section fourteen; the said northeast quarter of section number twenty-three of said last mentioned township; the said lots one, two, three and four of said last mentioned section twenty-three, and the said west half of the northwest quarter of said section number twenty-four of said last mentioned township; a more particular description of which said last mentioned deed is to the said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful and corrupt conspiracy and in further pursuance thereof and to effect the object of the same, the said Stephen Monroe Fields unlawfully and corruptly, at the unlawful and corrupt instigation and request of the said Robert Forrester, Benjamin N. Freeman, and Otis B. Spencer, did, on, to wit, the twenty-first day of October, in the year last aforesaid, at Durango aforesaid, procure the said George A. Shreck to sign, execute,
48 and deliver to him the said Stephen Monroe Fields a certain quitclaim deed purporting to convey to the said Otis B. Spencer certain of the said parcels of the said coal lands hereinabove described, to wit: the said west half of the southwest quarter of said section number thirteen of said township number thirty-two north of said range twelve west of said New Mexico principal meridian; the said south half of the northeast quarter of said section number fourteen of said last-mentioned township; the said southeast quarter of said last-mentioned section fourteen; the said northeast quarter of section number twenty-three of said last-mentioned township; the said lots one, two, three and four of said last-mentioned section twenty-three, and the said west half of the northwest quarter of said section number twenty-four of said last-mentioned township; a more particular description of which said last-mentioned deed is to the said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, and in further pursuance thereof and to effect the object of the same, the said Stephen Monroe Fields, at the unlawful and corrupt request and suggestion of the said Robert Forrester, Benjamin N. Freeman, and Otis B. Spencer, did, on, to wit, the seventeenth day of October, in the year last aforesaid, at Durango aforesaid, unlawfully and corruptly deliver to the said Benjamin N.
49 Freeman, and the said Benjamin N. Freeman, in further pursuance of and to effect the object of the said unlawful and corrupt conspiracy, did then and there unlawfully and corruptly receive from him, the said Stephen Monroe Fields, a certain quitclaim deed theretofore executed by the said John H. Swire and one Flora B. Swire, his wife, as grantors, and purporting to convey to the said Otis B.

Spencer certain of the said lands hereinbefore described, to wit: the said southeast quarter of the northeast quarter of said section number eleven of said township number thirty-two north of said range twelve west of said New Mexico principal meridian; the said east half of the southeast quarter of said last-mentioned section eleven; the said northwest quarter of section twelve of said last-named township; the said northeast quarter of the southwest quarter of said last-mentioned section twelve; the said northwest quarter of said section number thirteen of said last-mentioned township; and the northeast quarter of the northeast quarter of said section number fourteen of said last-mentioned township; a more particular description of which said last-mentioned deed is to the said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt
50 conspiracy and in further pursuance thereof and to effect the object of the same, the said Robert Forrester unlawfully and corruptly, on to wit, the first day of September, in the year last aforesaid, at Durango aforesaid, did cause and procure a certain surveyor, to wit one F. L. Clemens, to make a survey of a certain one of the said parcels of said coal lands hereinbefore described as situate within said township thirty-five north of range ten west of said New Mexico principal meridian, but as to which of the said parcels of coal land was so caused and procured to be surveyed, and as to which boundary thereof was so caused and procured to be surveyed, the said jurors are not informed and so cannot and do not here state.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Benjamin N. Freeman unlawfully, maliciously and corruptly, on to wit, the fifteenth day of September, in the year last aforesaid, at Durango aforesaid, did furnish and deliver to the said Joseph W. Dobbins the sum of sixty-three hundred seventy-four and 80/100 dollars in money, for the purpose of
51 enabling the said Dobbins to pay the same at the said land office to the said receiver thereof in the false guise of moneys of the said John W. Waters and Arthur J. Bagby for the final entry and purchase as coal lands at said land office by said John W. Waters and Arthur J. Bagby of that parcel of the said lands which is hereinbefore designated as parcel number ten; and that the said Dobbins immediately thereafter, and on to wit the day and at the place last aforesaid, in further pursuance of the said conspiracy and to effect the object thereof, and acting as the attorney in fact of the said John W. Waters and Arthur J. Bagby, did unlawfully and corruptly pay to the said receiver at the said land office the moneys last aforesaid in the false guise of moneys of the said John W. Waters and Arthur J. Bagby, so being paid in their behalf for the final entry and purchase of the

said last named parcel of land as coal lands; whereas, in truth and in fact, the said last mentioned moneys were not moneys of the said John W. Waters and Arthur J. Bagby, or either of them, as they the said Benjamin N. Freeman and Joseph W. Dobbins at the aforesaid respective times of such delivery and payment thereof well knew.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to
52 effect the object of the same, the said Robert S. Clements did unlawfully and corruptly deliver to the said Benjamin N. Freeman, and the said Benjamin N. Freeman did unlawfully and corruptly receive from the said Robert S. Clements, on to wit, the twelfth day of September, in the year last aforesaid, at Durango aforesaid, a certain quitclaim deed theretofore executed by the said John W. Waters and Arthur J. Bagby, and purporting to convey to the said Frank Eldredge the said lands hereinbefore designated as parcel number ten; a further description of which last mentioned deed is to said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Benjamin N. Freeman unlawfully, maliciously, and corruptly, on, to wit, the eighteenth day of September, in the year last aforesaid, at Durango aforesaid, did furnish and deliver to the said Joseph W. Dobbins the sum of sixty-four hundred dollars in money, for the purpose of enabling the said Joseph W. Dobbins to pay the same at the said land office to the said Receiver thereof in the false guise of moneys of the said Emma Smith and Belle Dominic for the final entry and purchase as
53 coal lands at said land office by said Emma Smith and Belle Dominic, of that parcel of the said lands which is hereinbefore designated as parcel number eleven, and that the said Joseph W. Dobbins immediately thereafter, and on, to wit, the day and at the place last aforesaid, did, in further pursuance of the said conspiracy and to effect the object thereof, and acting as the attorney in fact of the said Emma Smith and Belle Dominic, unlawfully and corruptly pay to the said Receiver at the said land office the moneys last aforesaid in the false guise of moneys of the said Emma Smith and Belle Dominic, so being paid in their behalf for the final entry and purchase of the said last named parcel of land as coal lands; whereas, in truth and in fact, the said last-mentioned moneys were not moneys of the said Emma Smith and Belle Dominic, or either of them, as they the said Benjamin N. Freeman and Joseph W. Dobbins at the aforesaid respective times of such delivery and payment thereof well knew.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Robert S. Clements did unlawfully and corruptly deliver to the said Benjamin N. Freeman, and the said Benjamin N. Freeman did unlawfully and corruptly
54 receive from the said Robert S. Clements, on, to wit, the twenty-sixth day of September, in the year last aforesaid, at Durango aforesaid, a certain quitclaim deed theretofore executed by the said Emma Smith and Belle Dominic and purporting to convey to the said Frank Eldredge the said lands hereinbefore designated as parcel number eleven; a further description of which last mentioned deed is to said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Benjamin N. Freeman, unlawfully, maliciously and corruptly, on, to wit, the eighteenth day of September, in the year last aforesaid, at Durango aforesaid, did furnish and deliver to the said John J. McKinnon the sum of thirty-two hundred dollars in money for the purpose of enabling the said John J. McKinnon to pay the same at the said land office to the said receiver thereof in the false guise of moneys of the said John M. Wigglesworth, for the final entry and purchase as coal lands at said land office by said John M. Wigglesworth of that parcel of the said coal lands which is hereinbefore designated as parcel number twelve; and that the said John J. McKinnon immediately
55 thereafter and on, to wit, the day and at the place last aforesaid, did, in further pursuance of the said conspiracy and to effect the object thereof, and acting as the attorney in fact of the said John M. Wigglesworth, unlawfully and corruptly pay to the said receiver at the said land office the moneys last aforesaid in the false guise of moneys of the said John M. Wigglesworth, so being paid in his behalf for the final entry and purchase of the said last named parcel of land as coal lands; whereas, in truth and in fact, the said last mentioned moneys were not moneys of the said John M. Wigglesworth, as they the said Benjamin N. Freeman and John J. McKinnon at the aforesaid respective times of such delivery and payment thereof well knew.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Robert S. Clements did, unlawfully and corruptly, deliver to the said Benjamin N. Freeman, and the said Benjamin N. Freeman did, unlawfully and corruptly, receive from the said Robert S. Clements, on, to wit, the twenty-eighth day of

September, in the year last aforesaid, at Durango aforesaid, a certain quitclaim deed theretofore executed by the said John M.
56 Wigglesworth and one Jessie J. Wigglesworth, his wife, and purporting to convey to the said Frank Eldredge the said lands hereinbefore designated as parcel number twelve: a further description of which last mentioned deed is to said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Robert Forrester and William H. Bird, on, to wit, the twenty-first day of September, in the year last aforesaid, at Durango aforesaid, unlawfully, maliciously, and corruptly did induce and procure one Patrick B. McAtee to subscribe and verify with his oath before one William C. Liesenberg, a notary public, a certain affidavit in substance and effect as follows, to wit:

STATE OF COLORADO,
County of La Plata, ss:

Patrick B. McAtee, being duly sworn, on oath says that he is a citizen of the United States and a resident of Durango, Colorado, and general agent for the Denver and Rio Grande and Rio Grande Southern Railway Companies, and as such general agent has been well acquainted with the construction of what is known as the Farmington Branch of the Denver and Rio Grande Railroad; that the construction of said branch was commenced during the month of February, 1905, and has continued to the present time; that said road has not been completed nor will it be operated until such time
57 as will be named by the general manager, which has been done by Circular No. 6, designating September 22nd, 1905, when the ticket agents and freight agents are instructed to sell tickets and receive freight and express over said line or branch; that said branch has not been surfaced nor are the permanent bridges completed over the waterways, and the road can not be said to be completed until such labor and work is done and completed.

PATRICK B. MCATEE.

Subscribed and sworn to before me this twenty-first day of September, A. D. 1905.

WILLIAM C. LIESENBERG,
Notary Public.

upon the paper of which said affidavit as so made is impressed the seal of the said notary public; and that the said Robert Forrester and William H. Bird thereafter and on, to wit, the twenty-first day of September, last aforesaid, at Durango aforesaid, did, unlawfully, corruptly, and maliciously and for the purpose of further effecting the object of the said unlawful and corrupt conspiracy, cause, by some means to the said jurors unknown, to be filed in the said land

office with the said register and receiver thereof the said affidavit of the said Patrick B. McAtee, with intent that the same should be read, considered, and relied on by the said register and receiver in the matter of their determination of the price that should be charged by the United States for the purchase of certain of the said parcels of coal land, pursuant to the said laws, rules, and regulations,
58 but in respect of which of the said parcels of coal land such last-mentioned affidavit was so caused to be filed, the said jurors are ignorant, and so can not and do not here say.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Benjamin N. Freeman unlawfully, maliciously, and corruptly, on to wit, the twenty-fourth day of October, in the year last aforesaid, at Durango aforesaid, did furnish and deliver to the said Joseph W. Dobbins the sum of fifty-five hundred sixteen and 80/100 dollars in money, for the purpose of enabling the said Dobbins to pay the same at the said land office to the said receiver thereof in the false guise of moneys of the said James H. Arnold and Gussie Wilkerson, for the final entry and purchase as coal lands at said land office by said James H. Arnold and Gussie Wilkerson of that parcel of the said lands hereinbefore designated as parcel number fourteen; and that the said Joseph W. Dobbins immediately thereafter, and on to wit, the day and at the place last aforesaid, did, in further pursuance of the said conspiracy and to effect the object thereof, and acting as the attorney in fact of the said James H. Arnold and Gussie Wilkerson, unlawfully and corruptly pay to the
59 said receiver at the said land office the moneys last aforesaid in the false guise of moneys of the said James H. Arnold and Gussie Wilkerson, so being paid in their behalf for the final entry and purchase of the said last-named parcel of land as coal lands; whereas, in truth and in fact, the said last-mentioned moneys were not moneys of the said James H. Arnold and Gussie Wilkerson, or either of them, as they the said Benjamin N. Freeman and Joseph W. Dobbins at the aforesaid respective times of such delivery and payment thereof well knew.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Robert S. Clements did unlawfully and corruptly deliver to the said Benjamin N. Freeman, and the said Benjamin N. Freeman did unlawfully and corruptly receive from the said Robert S. Clements, on to wit, the twenty-fourth day of October, in the year last aforesaid, at Durango aforesaid, a certain quitclaim deed theretofore executed by the said James H. Arnold and Gussie Wilkerson, and purporting to convey to the said Frank Eldredge the said lands hereinbefore designated as parcel number fourteen; a fur-

ther description of which last-mentioned deed is to said jurors unknown.

60 And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Benjamin N. Freeman unlawfully, maliciously and corruptly, on, to wit, the eighth day of November, in the year last aforesaid, at Durango aforesaid, did furnish and deliver to the said John J. McKinnon the sum of sixty-four hundred dollars in money, for the purpose of enabling the said John J. McKinnon to pay the same at the said land office to the said receiver thereof in the false guise of moneys of the said Ada Hubler and Effie E. DeLuche for the final entry and purchase as coal lands at said land office by said Ada Hubler and Effie E. DeLuche of that parcel of the said lands which is hereinbefore designated as parcel number fifteen; and that the said John J. McKinnon immediately thereafter, and on, to wit, the day and at the place last aforesaid, did, in further pursuance of the said conspiracy and to effect the object thereof, and acting as the attorney in fact of the said Ada Hubler and Effie E. DeLuche, unlawfully and corruptly pay to the said receiver at the said land office the moneys last aforesaid in the false guise of moneys of the said Ada Hubler and Effie E. DeLuche,

61 so being paid in their behalf for the final entry and purchase of the said last named parcel of land as coal lands; whereas, in truth and in fact, the said last mentioned moneys were not moneys of the said Ada Hubler and Effie E. DeLuche, or either of them, as they the said Benjamin N. Freeman and John J. McKinnon at the aforesaid respective times of such delivery and payment thereof well knew.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Robert S. Clements did unlawfully and corruptly deliver to the said Benjamin N. Freeman, and the said Benjamin N. Freeman did unlawfully and corruptly receive from the said Robert S. Clements, on, to wit, the tenth day of November, in the year last aforesaid, at Durango aforesaid, a certain quit-claim deed theretofore executed by the said Ada Hubler and Effie E. DeLuche, and purporting to convey to the said Frank Eldredge the said lands hereinbefore designated as parcel number fifteen; a further description of which last mentioned deed is to said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

62 That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Benjamin N. Freeman un-

lawfully, maliciously, and corruptly, on to wit, the eighth day of November, in the year last aforesaid, at Durango aforesaid, did furnish and deliver to the said Robert S. Clements the sum of sixty-four hundred dollars in money, for the purpose of enabling the said Robert S. Clements to pay the same at the said land office to the said receiver thereof in the false guise of moneys of the said Robert S. Clements and Maggie L. Smith, respectively, for the final entry and purchase as coal lands at said land office by said Robert S. Clements and Maggie L. Smith of that parcel of the said lands which is hereinbefore designated as parcel number thirteen; and that the said Robert S. Clements immediately thereafter, and on to wit, the day and at the place last aforesaid, did, in further pursuance of the said conspiracy and to effect the object thereof, unlawfully and corruptly pay to the said receiver at the said land office the moneys last aforesaid in the false guise of moneys of him the said Robert S. Clements and the said Maggie L. Smith, respectively, so being paid in their behalf for the final entry and purchase of the said last named parcel of land as coal lands; whereas, in truth and in fact, the said
63 last mentioned moneys were not moneys of the said Robert S. Clements and Maggie L. Smith, or either of them, as they the said Benjamin N. Freeman and Robert S. Clements at the aforesaid respective times of such delivery and payment thereof well knew.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Robert S. Clements did unlawfully and corruptly deliver to the said Benjamin N. Freeman, and the said Benjamin N. Freeman did unlawfully and corruptly receive from the said Robert S. Clements, on to wit, the tenth day of November, in the year last aforesaid, at Durango aforesaid, a certain quitclaim deed theretofore executed by the said Maggie L. Smith and the said Robert S. Clements and one Etta S. Clements, his wife, and purporting to convey to the said Frank Eldredge the said lands hereinbefore designated as parcel number thirteen; a further description of which last mentioned deed is to said jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to
64 effect the object of the same, the said Otis B. Spencer unlawfully, maliciously, and corruptly, on to wit, the first day of January, in the year of our Lord nineteen hundred and six, at to wit, the city and county of Denver, in said State and district of Colorado, did execute and deliver, as grantor, to The Calumet Fuel Company aforesaid, as grantee, a certain deed purporting to be a conveyance by him, the said Otis B. Spencer, to said The Calumet Fuel Company of the said parcels of the said coal lands hereinbefore described and

designated respectively as parcel number one, parcel number two, parcel number three, parcel number four, parcel number five, parcel number six, parcel number seven, parcel number eight, and parcel number nine; a further or more particular description of which last mentioned deed is to the said grand jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Frank Eldredge on, to wit, the twenty-third day of January, in the year of our Lord nineteen hundred and six, at Durango aforesaid, did unlawfully, corruptly, and maliciously execute a certain deed purporting to convey to the said The Calumet Fuel Company all and singular the said parcels of the
65 said coal lands hereinbefore respectively described and designated as parcel number ten, parcel number eleven, parcel number twelve, parcel number thirteen, parcel number fourteen, and parcel number fifteen, respectively, and which last-mentioned deed was also executed at the time and place last aforesaid, at the request of the said Frank Eldredge, by one Evelyn N. Eldredge, his wife; a further description of which last-mentioned deed is to the said grand jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy, as aforesaid, and in further pursuance thereof and to effect the object of the same, the said George W. Franklin and George C. Franklin unlawfully, corruptly, and maliciously did, on, to wit, the third day of February, in the year last aforesaid, at Durango aforesaid, severally and respectively subscribe their names to a certain writing in substance and effect following, to wit:

UNITED STATES LAND OFFICE, STATE OF COLORADO,

County of La Plata, ss:

George W. Franklin and George C. Franklin, each of lawful age, being first duly sworn on oath deposes and says, each for himself and not one for the other, that he has read the foregoing affidavit of James Baker, and that the allegations thereof are true; that he is familiar with the land described in the foregoing
66 affidavit and with each and every legal subdivision thereof; that he is not related to the said James Baker and has no interest in the said application or in the land described in the said application.

GEORGE W. FRANKLIN.
GEORGE C. FRANKLIN.

which said writing, when so subscribed, was written immediately below, and referred to, a certain other writing purporting to be the affidavit of the said James Baker, subscribed and sworn to by him

before one William S. Pickerill as a notary public, and purporting to bear the notarial seal of said William S. Pickerill as such, and in substance and effect as follows, to wit:

UNITED STATES LAND OFFICE,
DURANGO, COLORADO, *February 3rd, 1906.*

I, James Baker, of the city of Durango, county of La Plata, Colorado, claiming, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, the right of purchase to the southwest quarter of the northwest quarter (SW. 4 of NW. 4), and the northwest quarter of the southwest quarter (NW. 4 of SW. 4), section 13, and the northeast quarter of the southeast quarter (NE. 4 of SE. 4), section 14, all in township 35 north, range 10 west, N. M. P. M., subject to sale at Durango, Colorado, do solemuly swear that I am a native-born citizen of the United States, born in the town of Lincoln, county of Logan, in the State of Illinois; that I have never had the right of purchase under the aforesaid provisions of law, either as an individual or as a member of an association, and that I have never held any other land under its provisions.

I further swear that I have expended in developing coal mines on said tract, and in labor and improvements, the sum of fifty dollars, the nature of such improvements being as follows: Three
67 open cuts exposing the veins of coal therein; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal; and that there is not to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposits of gold, silver, or copper. So help me God.

JAMES BAKER.

Subscribed and sworn to before me this third day of February, 1906. My commission expires January 11, 1908.

WILLIAM S. PICKERILL,
Notary Public.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Benjamin N. Freeman unlawfully, maliciously, and corruptly did, on, to wit, the ninth day of February, in the year last aforesaid, at Durango aforesaid, take and receive

from the said James Baker a certain quitclaim deed theretofore executed by the said James Baker and purporting and by the said James Baker intended to convey from the said James Baker
68 as grantor to the said Benjamin N. Freeman, as grantee, the said parcel of said coal lands hereinbefore described and designated as parcel number sixteen; a more particular description of which last-mentioned deed is to said grand jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Benjamin N. Freeman did, unlawfully, and maliciously, on to wit the thirteenth day of February, in the year last aforesaid, at Durango aforesaid, did make and file in said land office with the register and receiver thereof a certain written application to purchase, in substance as follows, to wit:

I, William C. Rudersdorf, of the city of Durango, county of La Plata and State of Colorado, do hereby apply to purchase the south half of the northeast quarter (S. 2 of NE. 4) section 14, township 35 north, range 10 west, N. M. P. M., containing eighty (80) acres, according to the returns of the surveyor-general, for which I have agreed with the register to give at the rate of twenty dollars ($20.00) per acre, said land being situate within fifteen miles of a completed railroad.

WILLIAM C. RUDERSDORF,
By GEORGE W. FRANKLIN,
His Attorney in fact.

which said written application was then and there so made and
69 filed by the said George W. Franklin as the attorney in fact of the said William C. Rudersdorf, thereunto authorized by the said William C. Rudersdorf, and was so then and there made and filed of and concerning and for the purpose of assisting and procuring the making of entry as coal land at said land office by and in the name of said William C. Rudersdorf of said parcel of land hereinbefore designated and described as parcel number seventeen.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said George W. Franklin unlawfully, corfully, maliciously, and corruptly, on to wit the nineteenth day of February, in the year last aforesaid, at Durango aforesaid, take and receive from the said William C. Rudersdorf a certain quitclaim deed theretofore executed by the said William C. Rudersdorf and purporting and by the said William C. Rudersdorf intended to convey from the said William C. Rudersdorf as grantor to the said Benjamin N. Freeman as grantee the said parcel of said coal lands hereinbefore

described and designated as parcel number seventeen; a more particular description of which last-mentioned deed is to said grand jurors unknown.

70 And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Benjamin N. Freeman unlawfully, maliciously, and corruptly, on to wit the twenty-first day of July, in the year last aforesaid, at Durango aforesaid, did furnish and deliver to the said Joseph A. Clark the sum of sixteen hundred dollars in money, for the purpose of enabling said Joseph A. Clark to pay the same to the said receiver at the said land office in the making of a final entry and purchase as coal lands at said land office by and in the name of the said Joseph A. Clark of the said parcel of said coal lands hereinbefore described and designated as parcel number eighteen.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Benjamin N. Freeman unlawfully, maliciously, and corruptly, on to wit the seventh day of December, in the year last aforesaid, at Durango aforesaid, did receive from the said Joseph A. Clark a certain deed theretofore executed by the said Joseph A. Clark and one Gladys M. Dyer Clark, his

71 wife, as grantors, and purporting to convey to him the said Benjamin N. Freeman that one of the said parcels of coal land which is hereinbefore described and designated as parcel number eighteen, a further or more particular description of which said last-mentioned deed is to said grand jurors unknown.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of the said unlawful and corrupt conspiracy as aforesaid, and in further pursuance thereof and to effect the object of the same, the said Benjamin N. Freeman unlawfully, maliciously, and corruptly, on to wit the thirtieth day of March, in the year of our Lord nineteen hundred and seven, at Durango aforesaid, did execute and deliver to the said Robert Forrester, and the said Robert Forrester did unlawfully, maliciously, and corruptly, at to wit the time and place last aforesaid, receive from the said Benjamin N. Freeman a certain deed of conveyance purporting to convey from the said Benjamin N. Freeman to the said Robert Forrester all of the said parcels of land hereinbefore described and designated as parcel number sixteen, parcel number seventeen, and parcel number eighteen, respectively; a further and more particular description of which said last-mentioned deed is to said grand jurors unknown.

72 Against the peace and dignity of the United States of America and contrary to the form of the statute thereof in such case made and provided.

ERNEST KNAEBEL,
Special Assistant to the Attorney-General.
EARL M. CRANSTON,
United States Attorney for the District of Colorado.

(Endorsed:) No. 2026. United States District Court. District of Colorado. The United States of America v. Robert Forrester, Benjamin N. Freeman, Otis B. Spencer, Frank Eldredge, and George C. Franklin. Indictment: Conspiracy to defraud the United States. R. S. 5440 as amended. A true bill: E. D. Welker, foreman. Filed June 22, 1907. Charles W. Bishop, clerk.

73 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States, within and for the District of Colorado, sitting at Denver.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* ROBERT FORRESTER, BENJAMIN N. FREEMAN, Otis B. Spencer, Frank Eldredge, and George V. Franklin, defendants.	No. 2026. Indictment for conspiracy.

JOINT AND SEVERAL DEMURRER.

And now come the defendants named in the indictment herein, to wit: Robert Forrester, Benjamin N. Freeman, Otis B. Spencer, Frank Eldredge, and George C. Franklin, severally and respectively, and each in his own proper person, and the said defendants, respectively, having heard said indictment read, jointly say, and each of them for himself severally says, that the said indictment, and
74 the matters therein contained, in manner and form as the same are above stated and set forth, is not sufficient in law, and that the said named defendants are not, nor is any or either of them, bound by the law of the land to answer the said indictment, and this the said defendants jointly are, and each of them severally is, ready to verify.

The said defendants above named jointly and severally do further hereby demur to the said indictment, and jointly and severally say that the said indictment is wholly insufficient in law, for the following specifically stated reasons, to wit:

First: The said indictment does not charge or set forth the commission of any crime or offense by the defendants, or either or any of them, known to or recognized by any statute or statutes or law of the United States.

Second: That the matters and things, and each and every of them, set forth and contained in said indictment, do not charge the entering into by the defendants, or either of them, of a criminal conspiracy, within the meaning of Sec. 5440 of the Rev. Stats. of the United States, or of any other statute or statutes enacted by the Congress of the United States.

That each and every general allegation contained in said indictment, attempting to charge conspiracies to procure by fraudu-
75 lent representations, misstatements, concealments and the like, by the entrymen, in connection with each entry, respectively, incorporated into said indictment, are mere statements of legal conclusions and fill no office other than obscuring the vital facts, and that taking the allegations in said indictment, as a whole, it is manifest that the subject matter of the supposed conspiracies and each of them does not in law involve a state of facts sufficient to constitute a criminal conspiracy under the provisions of said section 5440, U. S. Rev. Stats.

And for other good and sufficient reasons appearing of record.

Wherefore, for want of a sufficient indictment in this behalf, the said defendants above named, jointly and severally pray judgment, and that by the Court the said defendants, and each and every of them, may be dismissed and discharged from the said premises in the said indictment specified.

G. Q. RICHMOND,
Attorney for Defendants.
JOHN M. WALDRON,
Special Counsel for Defendants.

(Endorsed:) No. 2026. In the District Court of the United States, within and for the District of Colorado. The United States of America, plaintiff, vs. Robert Forrester et al., defendants. Joint and several demurrer. Filed Nov. 9, 1907, Charles W. Bishop,
76 clerk. G. Q. Richmond, attorney for defendants. John M. Waldron, special counsel.

Nineteenth day November term, Tuesday, November 26th, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs.
ROBERT FORRESTER ET AL. } 2026. Indictment for conspiracy.

At this day come Ernest Knaebel, esquire, and S. R. Rush, esquire, special assistants to the Attorney-General, who prosecute the pleas of the United States in this behalf, and the defendants by G. Q. Richmond, esquire, and John M. Waldron, esquire, their attorneys, also come. And the joint and several demurrer to the indictment herein coming on now to be heard is argued by counsel to the hour of adjournment.

Twentieth day, November term, Wednesday, November 27th, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs.
ROBERT FORRESTER ET AL. } 2026. Indictment for conspiracy.

77 At this day come Ernest Knaebel, esquire, and S. R. Rush, esquire, special assistants to the Attorney-General, who prosecute the pleas of the United States in this behalf, and the defendants by G. Q. Richmond, esquire, and John M. Waldron, esquire, their attorneys also come. And the joint and several demurrer to the indictment herein coming on now to be heard is argued by counsel to the hour of adjournment.

Twenty-first day, November term, Friday, November 29th, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs.
ROBERT FORRESTER ET AL. } 2026. Indictment for conspiracy.

At this day come Ernest Knaebel, esquire, and S. R. Rush, esquire, special assistants to the Attorney-General, who prosecute the pleas of the United States in this behalf, and the defendants by G. Q. Richmond, esquire, and John M. Waldron, esquire, their attorneys, also come. And the joint and several demurrer to the indictment herein coming on now to be heard is argued by counsel to the hour of adjournment.

Twenty-second day, November term, Saturday, November 30th, A. D. 1907.

78 Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs.
ROBERT FORRESTER ET AL. } 2026. Indictment for conspiracy.

At this day come Ernest Knaebel, esquire, and S. R. Rush, esquire, special assistants to the Attorney-General, who prosecute the pleas

of the United States in this behalf, and the defendants by G. Q. Richmond, esquire, and John M. Waldron, esquire, their attorneys, also come. And the joint and several demurrer to the indictment herein coming on now to be heard, is argued by counsel and by the court taken under advisement.

Forty-first day, November term, Monday, December 30th, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs.
ROBERT FORRESTER, BENJAMIN N. FREEMAN, Otis B. Spencer, Frank Eldredge, and George C. Franklin.
2026. Indictment for conspiracy.

At this day comes Ernest Knaebel, esquire, assistant to the
79 Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants by John M. Waldron, esquire, and George Q. Richmond, esquire, their attorneys, also come. And the joint and several demurrers of the defendants to the indictment herein having heretofore come on to be heard, and having been argued by Ernest Knaebel, esquire, and Sylvester R. Rush, esquire, assistants to the Attorney-General, and by John M. Waldron, esquire, and George Q. Richmond, esquire, attorneys for the defendants, and having been taken under advisement, and the court having considered the same and being now fully advised in the premises; it seemeth to the court now here that the indictment herein is not sufficient in law to be answered unto and so the demurrer is hereby sustained.

To which order and ruling of the court the plaintiff excepts and an exception is hereby allowed to it.

Forty-eighth day, November term, Wednesday, January 8th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs.
ROBERT FORRESTER, BENJAMIN N. FREEMAN, Otis B. Spencer, Frank Eldredge, and George C. Franklin.
2026. Indictment for conspiracy.

80 At this day comes Ernest Knaebel, special assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants by George Q. Richmond, esquire, and John M. Waldron, esquire, their attorneys, also come. And the joint and several demurrer of the defendants to the indictment having heretofore and on, to wit, the thirtieth day of December, last, at this same term, been ordered sustained for the reasons

and upon the grounds, and none other, set forth and explained in the opinions of the court filed respectively on that day in this cause and in case number 2022 in this court, between the United States of America and F. W. Keitel and others, in so far as the latter opinion expressly relates to the first count in the indictment in the cause last mentioned.

It is now considered, ordered, and adjudged by the court that, upon the same grounds and for the same reasons in the said opinions expressed, and none others, the defendants of and from the premises in this said indictment specified be discharged and go hence hereof without day.

It is further ordered by the court that if the United States shall sue out a writ of error to the Supreme Court of the United States from this order and judgment, the defendants shall each enter into a personal recognizance before an United States Commis-
81 sioner in the sum of one thousand dollars ($1000) conditioned that he shall personally appear in this court on the first day of the next term thereof at Denver and from day to day and from term to term thereafter, and answer the indictment herein if the judgment herein shall be reversed by the said Supreme Court, and until such recognizances shall have been duly executed and filed with the clerk of this court the existing recognizances now on file in this case shall be and remain binding upon the defendants, and their respective sureties.

To which order and judgment the plaintiff then and there at the time thereof, excepted, and an exception was allowed to it.

82 UNITED STATES OF AMERICA,
District of Colorado, ss.

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
ROBERT FORRESTER, BENJAMIN N. FREEMAN, Otis B. Spencer, Frank Eldredge and George C. Franklin, defendants. } No. 2026.

Bill of exceptions.

Be it remembered that on the 9th day of November, 1907, in this cause, the defendants filed their joint and several demurrer to the indictment, which demurrer is in words and figures set forth in the transcript of the record proper of this cause, at pages 73 to 76 of such transcript, as such transcript will be certified pursuant to the writ of error to be sued out by the United States to review the judgment and decision, herein, in the Supreme Court, and afterwards and on, to wit, the 26th day of November, 1907, the same being one of the regular juridical days of the November 1907 term, of this

court, before the court, the Hon. Robert E. Lewis, district judge, presiding, John M. Waldron, esquire, and G. Q. Richmond, esquire, appearing as counsel for the defendants, and Ernest Knaebel, special assistant to the Attorney-General, appearing as counsel for the United States, this cause came on to be heard upon the indictment and the said demurrer of the defendants thereto, and then, and on divers days next following, was argued by counsel.

And thereafter, on to wit, the 30th day of December, 1907, of the said term, the court made its decision and order upon the
83 matters so heard and argued, sustaining the said demurrer to the indictment, for the reasons and upon the grounds, and those only, which are set forth in a certain written opinion of the court then filed by the court in this cause, and in so much of a certain other written opinion of the court then filed by it in cause number 2022 in this court, entitled The United States v. F. W. Keitel et al., as expressly relates to the first count of the indictment in the cause last mentioned, the court not deeming it necessary to pass upon or consider other objections urged to the indictment, which opinions are respectively in words and figures as follows, to wit:

84 In the District Court of the United States for the district of Colorado.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* ROBERT FORRESTER ET AL., DEFENDANTS.	No. 2026. R. S. U. S., sec. 5440.

The indictment charges that the five defendants on July 1, 1905, corruptly conspired among themselves and with seven other named persons and with divers persons to the grand jurors unknown, to defraud the United States of its valuable coal lands for the use and benefit of the Calumet Fuel Company, a corporation, consisting of more than thirty-five hundred acres of the value of $150,000. The charging part then sets out eighteen separate tracts, mostly quarter sections, of alleged coal lands, and charges that there were other tracts, descriptions of which are unknown to the grand jurors. It then sets forth the names of twenty-two persons whom it designates as entrymen and who were to be induced under said conspiracy to make entries of coal lands under persuasion and promise of pe-
85 cuniary reward by the defendants for the use of said corporation, that said entrymen were to make fraudulent applications to purchase and fraudulent final entries of said lands and to sign, execute and verify and cause to be filed in the land office written documents, papers and proofs which the rules and regulations then required to be made and filed, and among other things to state that such entryman was making such entry for his own use and benefit and not directly or indirectly for the use and benefit of any other person, which statement the entryman would well know was false; that such entries would be made under secret and fraudulent antecedent agreement to the effect that all the expense of making said

entry and the purchase price of said lands would be advanced by the defendants or said corporation, for its use and benefit, and that such entryman would thereafter execute conveyance to the land so entered by him, as directed; that said moneys were to be so paid to the receiver of the land office in the guise and appearance of moneys of the said respective entrymen, that the receiver and register would rely upon and believe in the truthfulness of said representations and that said lands were being entered for the use and benefit of the entrymen and act thereon under such belief in permitting the lands described to be entered and purchased from the United States, and the
86 Commissioner of the General Land Office likewise would so believe and so believing patents would issue for said lands to said entrymen, that said entrymen would be requested to and thereafter execute deeds conveying said lands to said corporation or to some other person, and thereafter by mesne conveyances title would be vested in said corporation, all being a part of said unlawful conspiracy to defraud the United States of said lands.

The indictment then proceeds to charge forty-nine separate overt acts in furtherance of said conspiracy. It is not thought necessary to minutely describe each overt act. They consist of alleged verified statements filed in the land office, setting forth that the applicant desires to purchase the quarter section named, that he had never theretofore exercised his right under the statute, that the lands were coal lands, that he desired to make the entry for his own use and benefit and not for any other person, that he was acquainted with the land, that the same was chiefly valuable for coal, that some of these applications were taken to the land office by some of the defendants or their agents for filing, that the defendants, through their agents and co-conspirators, furnished the money to purchase said lands, that conspirators caused persons other than entrymen to
87 make and file affidavits as to the character of said land, that said entrymen were required to execute deeds conveying said lands to defendants, their agents or said corporation, that said deeds were delivered, that the conspirators caused some of said lands to be surveyed, that they caused one McAtee to make an affidavit in reference to the distance of some of said lands from a completed railroad which defendants caused to be filed with the register and receiver, but does not charge that said affidavit was false.

The indictment does not negative the qualifications of any entryman nor that the amount of land limited in any one entry was exceeded, or that the officers were paid the amount required by law for the purchase of said lands.

The defendants demur to the indictment.

For reasons given on consideration of the first count in case No. 2022, United States of America v. F. W. Keitel, et al., and heretofore filed with the clerk, demurrer to this indictment is sustained.

Dec. 30, 1907.

ROB'T E. LEWIS, *District Judge.*

* * * * * * *

115 To which decision and order of the court so sustaining the said demurrer, for the reasons and upon the grounds in the said opinions set forth, the United States, by its counsel, then and there duly excepted.

And thereafter, on the 8th day of January, 1908, of the same term, the court, pursuant to the aforesaid previous decision and order, and for the reasons and upon the grounds aforesaid in the said opinions set forth, made and entered its final order and judgment in this cause, sustaining the said demurrer and adjudging that the defendants of and from the premises in the indictment specified be discharged and go hence without day.

To which order and judgment of the court, and each and every part thereof, and particularly to the parts thereof so, for the reasons and upon the grounds aforesaid, sustaining the said demurrer and adjudging that the defendants of and from the premises in the indictment specified be discharged and go hence without day, the United States, by its counsel, then and there duly excepted.

And forasmuch as the foregoing matters do not appear of record, the plaintiff tenders this its bill of exceptions, and prays that the same may be signed and duly authenticated and made a part of the record herein, which is accordingly done this 22nd day of January, 1908.

ROBT. E. LEWIS,
District Judge.

Service of the foregoing bill of exceptions was made upon us this day of January, 1908.

JNO. M. WALDRON,
Attorney for the defendants in the above entitled cause.

116 (Endorsed:) No. 2026. United States District Court, District of Colorado. The United States of America, plaintiff, v. Robert Forrester et al., defendants. Bill of exceptions. Filed Jan. 22, 1908. Charles W. Bishop, clerk.

117 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF, *v.* ROBERT FORRESTER, BENJAMIN N. FREEMAN, Otis B. Spencer, Frank Eldredge, and George C. Franklin, defendants.	No. 2026.

Petition for writ of error.

And comes now the United States, plaintiff herein, and says that on the 30th day of December, 1907, this court made its decision holding insufficient and setting aside the indictment in this cause, and that thereafter, and on the 8th day of January, 1908, this court, pursuant to that decision, entered judgment herein in favor of the de-

fendants and against this plaintiff, in which judgment and decision certain errors were committed to the prejudice of this plaintiff and of such a character as to entitle this plaintiff, under the law, to review the said judgment and decision in the Supreme Court of the United States by writ of error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

118 RALPH HARTZELL,
Ass't. & Acting United States Attorney for the District of Colorado,
ERNEST KNAEBEL,
Special Assistant to the Attorney-General,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Colorado, ss:

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed and that a writ of error as therein prayed be issued by the Clerk of the Circuit Court for this district, under the seal of such Circuit Court, pursuant to Section 1004 of the Revised Statutes.

Dated Denver, Jany 27th, 1908.

ROBT. E. LEWIS,
District Judge.

(Endorsed:) No. 2026. United States District Court. District of Colorado. The United States of America, plaintiff, v. Robert Forrester, et al., defendants. Petition for writ of error. Filed Jan. 27, 1908. Charles W. Bishop, clerk. Earl M. Cranston, U. S. Attorney for the District of Colorado; Ernest Knaebel, Spl. Asst. to the Attorney-General, Attorneys for Plaintiff.

119 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the district of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
ROBERT FORRESTER, BENJAMIN N. FREEMAN, Otis B. Spencer, Frank Eldredge and George C. Franklin, defendants. } No. 2025.

Assignment of Errors.

Comes now the United States of America, plaintiff in the above-entitled cause, and files this assignment of errors to the judgment

heretofore entered by the District Court for the district of Colorado in the above-entitled cause, to wit:

First. The District Court for the district of Colorado erred in sustaining the joint and several demurrer of the defendants to the indictment, and in rendering judgment for the defendants.

Second. The said District Court erred in sustaining the said demurrer and rendering the said judgment upon, and because of, an erroneous construction of section 5440 of the Revised Statutes, as amended (21 Stat. L., p. 4), whereby the said District Court, in substance and effect, held that the scheme and conspiracy in the
120 indictment described would, if carried out, work no defrauding of the United States within the meaning of that statute, although such scheme and conspiracy so described, contemplated and intended, and for its effectuation necessarily involved, both the obtaining from the United States of valuable coal lands in excess of the quantity allowed by law, and the accomplishment of that result by deceiving the officials of the land department through the making of false representations of material facts, and the creation through conduct and concealment of false and deceptive appearances, all tending, and by the conspirators designed, to induce such officials to believe to be lawful and bona fide, and therefore to act favorably upon, applications to enter coal lands, which in fact would be fraudulent and unlawful.

Third. The said District Court erred in omitting to follow and apply the decision of the Supreme Court in United States vs. The Trinidad Company, 137 U. S., 161.

Fourth. The said District Court erred in its construction of section 5440 of the Revised Statutes as amended, in holding that the word "defraud" therein refers solely to such frauds as at common law were punished as substantive, independent criminal offenses.

Fifth. The said District Court erred in holding that the conspiracy described in the indictment is not such as at common law, and tested by common law principles and precedents without more would have been punishable as a criminal conspiracy.

Sixth. The said District Court erred in misconstruing section 5440 of the Revised Statutes, as amended, in connection
121 with the general definition of conspiracy given in Pettibone v. United States, 148 U. S., 197, so as to limit and restrain the application of that statute to conspiracies to commit substantive, independent criminal offenses against the United States, and conspiracies to defraud the United States necessarily involving the commission of such substantive, independent criminal offenses.

Seventh. The said District Court erred in its construction of section 5440 of the Revised Statutes (as amended), in holding that no agreement or conspiracy is within the denunciation thereof which does not contemplate and involve the perpetration of some act, either amounting to an independent crime under some other act of Congress, or unlawful in the restricted sense of being an act distinctly and specifically prohibited by some other act of Congress.

Eighth. The said District Court erred in sustaining the said demurrer and rendering the said judgment upon the basis of, and because of, the erroneous statutory constructions indicated in the second, fourth, sixth and seventh specifications of this assignment of errors.

Ninth. The said District Court erred in holding that the facts set forth in the indictment in this case, although sufficient to justify a court of equity in setting aside, for fraud, at the suit of the United States, patents for coal lands obtained in the manner stated in said indictment, do not amount to a fraud upon the United States within the meaning of section 5440 of the Revised Statutes (as amended), making it an offense for two or more persons to conspire to defraud the United States in any manner or for any purpose.

122 Wherefore, The United States of America prays that the judgment of the District Court of the United States for the District of Colorado be reversed, and that the said District Court be directed to reinstate the said indictment and proceed with the trial of the cause.

RALPH HARTZELL,
Assistant and Acting United States Attorney for the District of Colorado.

ERNEST KNAEBEL,
Special Assistant to the Attorney-General.

(Endorsed:) No. 2026. In the U. S. District Court. The United States of America, Plaintiff, vs. Robert Forrester, Benjamin N. Freeman, Otis B. Spencer, Frank Eldredge and Charles C. Franklin, Defendants. Assignment of errors. Filed Jan. 27, 1908. Charles W. Bishop, clerk. Earl M. Cranston, U. S. Attorney, for the District of Colorado.

123 Fifty-seventh day, November term. Monday, January 27th, A. D. 1908.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA
vs.
ROBERT FORRESTER ET AL. } 2026. Indictment for conspiracy.

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed, and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

124 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States for the District of Colorado.

UNITED STATES
versus
ROBERT FORRESTER ET AL. } No. 2026.

The clerk will issue a complete transcript of the record in the above entitled cause, said transcript to contain indictment, all demurrers, and all orders of court, together with the opinion of the court in this case and in case No. 2022.

EARL M. CRANSTON,
Attorney for U. S.

To CHARLES W. BISHOP, *Clerk.*

DENVER, COLORADO, *Jan. 4, 1908.*

(Endorsed:) No. 2026. United States District Court for the district of Colorado. U. S. versus Robert Forrester et al. Praecipe for transcript of record. Filed Jan. 4, 1908. Charles W. Bishop, clerk. Earl M. Cranston, Attorney for U. S.

125 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Judge of the District Court of the United States for the District of Colorado, greeting:

Because in the decision, record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between The United States of America, plaintiff, and Robert Forrester, Benjamin N. Freeman, Otis B. Spencer, Frank Eldredge and George C. Franklin, defendants, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of January, in the year of our Lord one thousand nine hundred and eight.

[SEAL.]

CHARLES W. BISHOP,
Clerk of the Circuit Court of the United States
for the District of Colorado.

Allowed by—

ROBT. E. LEWIS,
Judge of the United States District Court
for the District of Colorado.

126 *Return.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the Honorable the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said United States District Court for the district of Colorado, at Denver, in said district, this first day of February, A. D. 1908.

[SEAL.]

CHARLES W. BISHOP, *Clerk.*

127 (Indorsed:) No. 2026. United States District Court, District of Colorado. The United States of America, plaintiff, v. Robert Forrester et al., defendants. Writ of error. Filed in United States District Court, District of Colorado, January 27, 1908. Charles W. Bishop, Clerk.

128 UNITED STATES OF AMERICA, *ss:*

To Robert Forrester, Benjamin N. Freeman, Otis B. Spencer, Frank Eldredge, and George C. Franklin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Colorado, sitting at Denver, wherein The United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert E. Lewis, judge of the District Court of the United States for the District of Colorado, this 27th day of January, in the year of our Lord one thousand nine hundred and eight.

ROBT. E. LEWIS,
Judge of the District Court of the United States
for the District of Colorado.

I hereby acknowledge service of the foregoing citation, this 28th day of January, 1908.

J. Q. RICHMOND,
Attorney for Defendants.

(Indorsed:) 2026. U. S. District Court, District of Colorado. The United States of America vs. Robert Forrester, Benjamin N. Freeman, Otis B. Spencer, Frank Eldredge, and George C. Franklin. Citation. Filed Jan. 28, 1908. Charles W. Bishop, clerk.

129 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to one hundred and twenty-four (124), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings and other matters set forth in the praecipe filed herein, together with a true copy of such praecipe and bill of exceptions, petition for writ of error, and assignments of error, and judgment and all other matters (exclusive of bench warrants, recogizances, and briefs) heretofore filed or entered of record in said court, and in a certain case lately in said court pending wherein the United States of America was plaintiff and Robert Forrester, Benjamin N. Freeman, Otis B. Spencer, Frank Eldredge, and George C. Franklin were defendants, as fully and completely as the same still remain on file and of record in my office at Denver.

And I further certify that I have annexed to and transmit herewith a copy of all opinions heretofore handed down and filed in the above-entitled case and in case No. 2022 wherein The United States of America was plaintiff and F. W. Keitel and others were defendants.

In testimony to the above I do hereunto sign my name and affix the seal of said court at the city and county of Denver, in said district, this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

162 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one hundred thirty (130) to one hundred sixty-two (162) to be a true, perfect, and complete transcript and copy of all opinions heretofore handed down and filed in said court and in two certain cases lately in said court pending wherein the United States of America was plaintiff and Robert Forrester, Benjamin N. Freeman, Otis B. Spencer, Frank Eldredge, and George C. Franklin, were defendants; and the United States of America was plaintiff and F. W. Keitel and others were defendants, respectively, as fully and completely as the same still remain on file in my office at Denver.

In testimony to the above I do hereunto sign my name and affix the seal of said court at the city and county of Denver, in said district, this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

163 In the Supreme Court of the United States, October term, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ROBERT FORRESTER ET AL. } No. 626.

Stipulation.

It is hereby stipulated by counsel for the parties to the above-entitled cause that in the printing of the transcript of the record herein the clerk of the Supreme Court shall omit pages 88 to 114, inclusive, being the opinion of the court in the case of the United States v. F. W. Keitel et al., and pages 134 to 162, inclusive, being a repetition of the same opinion, which will be printed in that case; also pages 130 to 133, inclusive, being a repetition of the opinion of the court herein, that opinion appearing elsewhere, to wit: At pages 84 to 87, inclusive, of the transcript of the record. This stipulation is not to be construed as a consent to the consolidation of the said Keitel case with the said Forrester case for purposes of final hearing and oral argument, vitally different questions of law being involved in said causes, respectively.

H. M. HOYT,
Solicitor-General.
JNO. M. WALDRON,
G. Q. RICHMOND,
Counsel for Defendant in Error.

February, 1908.

164 (Indorsed:) File No. 21029. Supreme Court U. S. October term, 1907. Term No. 626. The United States, P. E., vs. Robert Forrester, et al. Stipulation to omit part of record in printing. Filed Feb. 29, 1908.

165 Indorsed on cover:) File No. 21029. Colorado, D. C. U. S. Term No. 626. The United States, plaintiff in error, vs. Robert Forrester, Benjamin N. Freeman, Otis B. Spencer et al. Filed February 19th, 1908. File No. 21029.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 630.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES E. HERR AND GEORGE C. FRANKLIN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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1 Pleas in the District Court of the United States for the District of Colorado, sitting at Denver.

Be it remembered that heretofore, and on, to wit, the twenty-second day of June, A. D. 1907, the same being one of the regular judicial days of the May term, A. D. 1907, of said court; present, the Honorable Robert E. Lewis, district judge, the following proceedings were had and entered of record in said court, to wit:

In the matter of the Grand Jury.

At this day come the members of the grand jury, heretofore duly empanelled and sworn as grand jurors, and return into court now here the following true bills of indictment, to wit:

* * * * * * *

THE UNITED STATES OF AMERICA *vs.* CHARLES E. HERR AND GEORGE C. FRANKLIN.	2030. Indictment for conspiracy.

(Endorsed:) A true bill.
(Signed) E. D. WELKER, *Foreman.*

And thereupon it is ordered by the court that a bench warrant issue without delay against the defendants and returnable forthwith; and that the defendants be let to bail before an United States commissioner for their appearance in this court from day to
2 day and from term to term to answer unto the indictment herein, as follows, to wit: Charles E. Herr in the sum of five thousand dollars ($5,000) and George C. Franklin in the sum of three thousand dollars ($3,000).

* * * * * * *

And the said indictment is in words and figures as follows, to wit:

In the District Court of the United States of America for the District of Colorado. Of the May term, in the year nineteen hundred and seven.

DISTRICT OF COLORADO, *ss:*

At the May term of the District Court of the United States of America within and for the District of Colorado, begun and held in the city of Denver, in said district, on the seventh day of May, nineteen hundred and seven, the grand jurors of the United States of America within and for said district having been duly empanelled, sworn, and charged to inquire into and true presentment make of all offenses committed within said district against the laws of the United States of America, upon their oath aforesaid, in the name and by the authority of the United States of America, do find and present:

3 That Charles E. Herr and George C. Franklin, hereinafter in this indictment called the defendants, on the first day of January, in the year of our Lord nineteen hundred and five, at the city of Durango, in the county of La Plata, in the said District of Colorado and within the jurisdiction of said court, unlawfully, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together, and with Charles C. Mumma and William S. Pickerill, hereinafter referred to as agents of the said defendants, and also with divers other persons to the said grand jurors unknown, to induce, procure, and hire divers other persons, hereinafter called entrymen and mentioned by name as such in that part of this indictment within overt acts are charged to have been committed by the said defendants, being overt acts numbered from 1 to 6, both inclusive, to make false, fictitious, illegal, and fraudulent entries at the land office of the said United States at Durango aforesaid, of certain tracts of coal lands of the said United States, to wit, the tracts mentioned and described by legal subdivisions in the said overt acts, in all amounting to a large number, to wit, nine hundred and sixty acres, and being of great value, to wit, of the value of one hundred thousand dollars ($100,000), and at and in the making of such entries, powers of attorneys, nonmineral affidavits, and

4 affidavits at purchase, to make representations and statements of facts to the register of the said land office which would be known by the said defendants, agents, and entrymen to be false, fictitious, illegal, and fraudulent in certain material matters hereinafter specified, and thereby wrongfully and deceitfully cause the said register to act, in administering the said laws and the regulations in that behalf made in pursuance of law, otherwise than they would or lawfully could act were he aware of such falsity, illegality, and fraud in the said representations and statements—that is to say, cause the said register to accept such false, fraudulent, and illegal entries from and make sales of such lands to such entrymen, and take the necessary steps to cause patents for such lands to be issued by the said United States to the said entrymen, and this in cases where the said register would have no personal knowledge as to such facts, and would be authorized and required by said laws and regulations to receive and act upon such false, fraudulent, and untrue representations and statements as though they were true; it being, as the grand jurors aforesaid, upon their oath aforesaid, charge the facts to be, the intention and design of the said defendants, and through their said agents, themselves to furnish such entrymen with the moneys necessary to make payment to the receiver of the said land office of the price fixed by law for the said

5 lands, and thereupon require conveyances from the said entrymen to be made through their said agents to themselves and to such persons or corporations as the said defendants might designate of the title to the said lands, as is hereinafter more particularly set forth; and thereby the said defendants unlawfully, corruptly,

wickedly, and maliciously did conspire, combine, confederate, and agree together and with their said agents and with others, indirectly, deceitfully, and fraudulently by the means aforesaid, to obtain for themselves, from the said United States, certain of the public lands and property of the said United States in quantity greatly in excess of that which either or any or all of the said defendants would lawfully be allowed to obtain directly from the United States under proper and lawful administration of the said laws and regulations, and in that manner to defraud the said United States of its valuable property in such lands, and also of its governmental function in the matter of preserving and disposing of the same lands, as well as out of its right to administer an intelligent and honest service in that behalf in the interests of the people of the said United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said unlawful conspiracy, combination, confederation, and agreement then and there was one growing
6 out of and based upon the existence of the facts and circumstances now here set forth, and was one to be effected in the manner and by the means and methods now here described; that is to say:

On the said first day of January, in the year of our Lord nineteen hundred and five, there were lying in the Durango land district, and within the said District of Colorado, certain surveyed vacant public lands of the said United States known as coal lands, not then otherwise appropriated or reserved by competent authority, or containing valuable minerals other than coal, which were then open to entry at the said land office at Durango aforesaid under the laws of the said United States pertaining to the entry and sale of such coal lands and under the rules and regulations theretofore made and prescribed pursuant to law by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior; that is to say, the coal lands mentioned and described by legal subdivision in the said overt acts numbered one to six, inclusive; and the said defendants and their said agents were, by promise and payment of reward to them in some small sum, the amount whereof is to the said grand jurors unknown, to induce, procure, and hire the said entrymen to make entries of the said coal lands at the said land office, with the said register, in the quantities, not exceeding the quantity
7 allowed by law to them respectively, in pursuance of certain agreements between the said defendants and the said entrymen in some cases, and between the said agents and the said entrymen in others, under which the said entrymen were severally to make, execute, and furnish to the said register all the necessary papers, affidavits, declarations, and statements required by the said laws and regulations from such entrymen in connection with the making of such entries, and among other declarations and statements to the effect that each of such entrymen was then purchasing and intending to purchase his respective tract of such land for him-

self; that he was then in the actual possession of the same; that he was well acquainted with the character thereof, having frequently passed over the same; and that he had located and opened a valuable coal mine on the same; whereas in truth and in fact, as such entryman would then well know, he would not then be purchasing or intending to purchase such lands for himself at all, and would not then be in actual possession of the same, and would not then be at all acquainted with the character of such lands or have ever passed over the same, and would not have opened or located any mine of coal or any mine whatever thereon, but, on the contrary, would be purchasing and intending to purchase his tract of such lands for the use, as he would suppose, of the particular defendant's agent of the said defendants with whom he would be dealing under
8 his particular agreement; and under which said agreement the said entrymen were by means of such entries and by payment to the said receiver of the said land office of the price fixed by law for such coal lands to obtain from the said United States its title by patent to and the possession and use of such coal lands (which said money was, as aforesaid, to be furnished to the said entryman by the said defendants or by the said agents, as the case might be); and under which said agreements also the entrymen were thereupon severally to make conveyance of title to the said coal lands to the said defendants or to the agents of the said defendants with whom they respectively dealt or to such other person or corporation as the said defendants or agents should designate as aforesaid; and in those cases where such conveyances of title were made to the said agents, the said agents respectively were thereupon to convey to the said defendant Charles E. Herr, or such other person or corporation as the defendants should designate, the said lands for the use and benefit of all the said defendants.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr and George C. Franklin afterwards, to wit, on the thirty-first day of January,
9 in the year of our Lord one thousand nine hundred and six, at Durango aforesaid, in said county of La Plata, in the said District of Colorado, did then and there deliver to the said register of the said land office at Durango aforesaid, for filing by him as such register in the matter of coal cash entry No. 83, of one John R. Pickerill, covering the following described coal lands of the United States, to wit, lots 3, 4, and 11 and the NW. ¼ of the SW. ¼ of section 7, township 35 north and range 10 west, and lots 1 and 8 of section 12, in township 35 north, range 11 west, reference being had to the New Mexico principal meridian and the base line, the documents, statements, and affidavits required by law and the regulations of the General Land Office, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr and George C. Franklin afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at Durango aforesaid, in the said county of La Plata, in the said District of Colorado, did then and there deliver to the said register of the said land office at Durango aforesaid, for filing by him as such register in the matter of the coal cash entry No. 80, of one Elmira Pickerill, covering the SE. ¼ of the NW. ¼ and the E. ½ of the SW. ¼ of section 18, and the NE. ¼ of the NW. ¼ of section 19, in township 35 north and range 10 west, reference being had to the New Mexico principal meridian and base line in Colorado, the documents, statements, and affidavits required by law and regulations of the General Land Office, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said Charles E. Herr and George C. Franklin afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at Durango aforesaid, in the said county of La Plata, in said District of Colorado, did then and there deliver to the said register of the said land office at Durango aforesaid, for filing by him as such register in the matter of coal cash entry No. 81, of one Julian Lloyd, covering the following-described coal lands of the United States, to wit, lots 1, 2, 3, and 4, in township 35 north and range 10 west, reference being had to the New Mexico principal meridian in Colorado and the base line, the documents, statements, and affidavits required by law and regulations of the General Land Office, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase.

4. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr and George C. Franklin afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at Durango aforesaid, in said county of La Plata, in said District of Colorado, did then and there deliver to the said register of the said land office at Durango aforesaid, for filing by him as such register in the matter of coal cash entry No. 78, of one Sarah Minnick, covering the following-described coal lands of the United States, to wit, lots 5 and 10 of section 7 and the NE. ¼ of the NW. ¼ and the W. ½ of the NE. ¼, section 18, township 35 north, and range 10 west, reference being had to the New Mexico principal meridian and base line in Colorado, the documents, state-

ments, and affidavits required by law and the regulations of the
12 General Land Office, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase.

5. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr and George C. Franklin afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at Durango aforesaid, in the said county of La Plata, in said District of Colorado, did then and there deliver to the said register of the said land office at Durango aforesaid, for filing by him as such register in the matter of the coal cash entry No. 79, of one Florence Garman, covering the W. ½ of the SE. ¼ of section 18 and the W. ½ of the NE. ¼ of section 19, in township 35 north and range 10 west, reference being had to the New Mexico principal meridian and the base line in Colorado, the documents, statements, and affidavits required by law and the regulations of the General Land Office, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase.

6. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said
13 unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr and George C. Franklin afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at Durango aforesaid, in said county of La Plata, in said District of Colorado, did then and there deliver to the said register of the said land office at Durango aforesaid, for filing by him as such register in the matter of coal cash entry No. 82, of one William H. Mumma, covering the E. ½ of the NE. ¼ and the E. ½ of the SE. ¼ of section 13, township 35 north, and range 11 west, reference being had to the New Mexico principal meridian and base line, the documents, statements, and affidavits required by law and the regulations of the General Land Office, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase.

7. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said Charles E. Herr afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at the city of Durango, in
14 the said county of La Plata, in the said District of Colorado, did then and there make a certain nonmineral affidavit in the matter of the said coal cash entry of John R. Pickerill and subscribed his name to the same and made oath to the same before F. C. Perkins, register of said land office at Durango aforesaid, he, the

said F. C. Perkins, then and there being duly authorized to administer said oath under the laws of the United States, and thereupon filed and caused to be filed with the register of the United States land office at Durango, in the said District of Colorado, the said nonmineral affidavit so subscribed and sworn to, the said nonmineral affidavit so made and sworn to being filed in said coal-land entry of the said John R. Pickerill.

8. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said Charles E. Herr and George C. Franklin afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at the city of Durango, in the said county of La Plata, in the said District of Colorado, did then and there procure one Charles C. Mumma to make a certain corroborating nonmineral affidavit in the matter of the said coal cash entry of said John R. Pickerill, and did then and there procure the said Charles C. Mumma to sign his name
15 to the same and to make oath to the same before F. C. Perkins, register of the said land office at Durango, Colorado, who was then and there duly authorized to administer said oath under the laws of the United States, and thereupon filed and caused to be filed with the register of the said land office at Durango said affidavit so made, subscribed, and sworn to by the said Charles C. Mumma.

9. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said George C. Franklin afterwards, to wit, on the thirtieth day of January, in the year of our Lord one thousand nine hundred and six, at the city of Durango, in the said county of La Plata, in said District of Colorado, did then and there make a certain corroborating nonmineral affidavit in the matter of the coal cash entry of said John R. Pickerill and subscribe his name to the same and made oath to the same before F. C. Perkins, register of said land office at Durango, Colorado, who was then and there duly authorized to administer said oath under the laws of the United States, and thereupon filed the same and caused the same to be filed with the register of the United States land office at Durango aforesaid, in the District of Colorado, as a part of the said coal-land entry of John R. Pickerill.

16 10. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at Durango, in said county of La Plata, in said District of Colorado, did then and there make and subscribe his name to a certain nonmineral affidavit required by law and the rules and regulations of the General Land Office in the said

described coal-land entry of Elmira Pickerill, to which said affidavit, on said last named date, the said Charles E. Herr made oath before F. C. Perkins, register of said land office, who was then and there duly authorized to administer said oath under the laws of the said United States, and thereupon, and on the same date, he, the said Charles E. Herr, did file the said nonmineral affidavit with the register of the said land office at Durango aforesaid, in the said county of La Plata, in the District of Colorado, as a part of the said coal-land entry of Elmira Pickerill.

11. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr and George C.
17 Franklin afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at Durango, in the said county of La Plata, in the said District of Colorado, did then and there induce and pursuade one Charles C. Mumma to then and there subscribe his name to a certain nonmineral affidavit required by law and the rules and regulations of the General Land Office in the said coal-land entry of Elmira Pickerill, and induced and persuaded the said Charles C. Mumma to make oath to said affidavit before F. C. Perkins, register of said land office, who was then and there duly authorized under the laws of the United States to administer the same.

12. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at Durango, in said county of La Plata, in said District of Colorado, did then and there make and subscribe his name to a certain nonmineral affidavit required by law and the rules and regulations of the General Land Office in the said described coal-land entry of Sarah Minnick, to which affidavit the said
18 Charles E. Herr made oath before F. C. Perkins, register of said land office, who was then and there duly authorized to administer said oath under the laws of the United States, and thereupon, and on the same date, filed the said affidavit with the register of the United States land office at Durango aforesaid as a part of the said coal-land entry of said Sarah Minnick.

13. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr afterwards, to wit, on the tenth day of February, in the year of our Lord one thousand nine hundred and six, at Durango, in the said county of La Plata, in the said District of Colorado, did then and there unlawfully and wilfully write and cause to be written and did deposit and cause to be deposited in the United States post-office at Durango, Colorado, for transmis-

sion by and through the United States mail service to Sarah Minnick at Dayton, in the State of Ohio, a certain letter and writing, partly written and partly printed, of the tenor which here follows:

DURANGO, COLORADO, *February 10th, 1906.*

MRS. SARAH MINNICK,
Dayton, Ohio, R. R. No. 15.

DEAR AUNT: I have herewith enclosed you draft for $100.00; I also enclose receipt for $3,300.00, which you will please sign and return to me. The $100.00 is profit due you and the other $3,200.00 covers loan I made to you at the time of signing the papers, which has been paid off by C. C. Mumma.

19 Trusting that you are all well, I remain,
Yours, very truly,

CHARLES E. HERR.

14. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr and George C. Franklin afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at Durango, in said La Plata County, in the said District of Colorado, did then and there unlawfully and knowingly induce and persuade the said Charles C. Mumma to then and there subscribe his name to certain nonmineral affidavit required by law and the rules and regulations of the General Land Office in the said described coal-land entry of Florence Garman, and the said Charles C. Mumma on said date made oath to the said affidavit before F. C. Perkins, register of the said land office at Durango, as a part of the said coal-land entry of said Florence Garman.

15. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr afterwards, to wit, on the tenth day of February, in the year of our Lord one thousand
20 nine hundred and six, at Durange, in the said county of La Plata, in the said District of Colorado, did then and there unlawfully and wilfully write and cause to be written and did deposit and cause to be deposited in the United States post-office at Durango, Colorado, for transmission by and through the United States mail service to Florence Garman at Dayton, in the State of Ohio, a certain letter and writing, partly written and partly printed, of the tenor which here follows:

DURANGO, COLORADO, *February 10th, 1906.*

MRS. FLORENCE GARMAN,
Dayton, Ohio, R. R. # 15.

DEAR COUSIN: I have herewith enclosed you draft for $100.00; I also enclose receipt for $3,300.00, which you will please sign and return to me. The $100.00 is profit due you and the other $3,200

covers loan I made to you at the time of signing the papers, which has been paid off by C. C. Mumma.

Trusting that you are all well, I remain,

Yours, very truly, CHARLES E. HERR.

16. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr and George C. Franklin afterwards, to wit, on the thirty-first day of January, in the year of our Lord one thousand nine hundred and six, at Durango, in said county of La Plata, in said District of Colorado, did then and there induce and procure one Charles C. Mumma to then and there subscribe his name to a certain nonmineral affidavit required by law and the rules and regulations of the General Land
21 Office and to make oath to said affidavit on said date before F. C. Perkins, register of said land office, who was then and there duly authorized to administer said oath under the laws of the United States, as a part of the said coal-land entry of one Julian Lloyd.

17. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of the said unlawful conspiracy, combination, confederation, and agreement, and to effect the object of the same, the said Charles E. Herr afterwards, to wit, on the twenty-third day of October, in the year of our Lord one thousand nine hundred and five, at Dayton, in the county of Montgomery, in the State of Ohio, did then and there induce and persuade one James H. Lloyd to then and there subscribe his name to a certain relinquishment in the form required by law and the rules and regulations of the General Land Office, and he, the said James H. Lloyd, did then and there, on said date last mentioned, relinquish all his right, title, and interest in and to the SE. ¼ of the SE. ¼ of section 18, and the NE. ¼ of the NE. ¼ of section 19, and the N. ½ of the NW. ¼ of section 20, township 35 north, and range 10 west, reference being had to the New Mexico principal meridian and base line, which said land had been acquired by the said James H. Lloyd by virtue of his coal declaratory statement No. 704, filed in the United States
22 land office at Durango, Colorado, on the twentieth day of December, in the year of our Lord one thousand nine hundred and four.

18. And the grand jurors aforesaid, upon their oath aforesaid, do further present that, further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, the said defendant, George C. Franklin, and the said agent, Charles C. Mumma, afterwards, to wit, the first day of February, in the year of our Lord one thousand nine hundred and five, and at divers and sundry times thereafter, the exact dates being unknown to the grand jurors, in the county of La Plata, in the said District of Colorado, did then and there unlawfully and knowingly go upon each and

every tract of coal land described in this indictment in over acts numbered 1 to 6, inclusive, and locate and open a mine of coal thereon, and did do and perform certain other labors, the exact nature of which is to the grand jurors unknown, on said lands for the purpose of discovering deposits of coal on said lands.

Against the peace and dignity of the United States of America and contrary to the form of the statutes of the same in such case made and provided.

EARL M. CRANSTON,
United States Attorney.

(Endorsed:) No. 2030. United States District Court, District of Colorado. The United States of America *vs.* Charles E. Herr and George C. Franklin. Indictment, conspiracy to defraud the United States. R. S. 5440 as amended. A true bill, E. D. Welker, foreman. Filed June 22, 1907, Charles W. Bishop, clerk.

23 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States for the District of Colorado, sitting at Denver.

THE UNITED STATES OF AMERICA
vs.
CHARLES E. HERR AND GEORGE C. FRANKLIN. } No. 2030.

Joint and several demurrer.

And now come the defendants named in the indictment herein, to wit, Charles E. Herr and George C. Franklin, severally and respectively, and each in his own proper person, having heard said indictment read, jointly say, and each for himself severally says, that the said indictment and the matters therein contained, in manner and form as the same are therein set forth, is not sufficient in law, nor are they, or either of them, bound by the law of the land to answer the said indictment, and this the said defendants jointly are, and each of them severally is, ready to verify.

And the said defendants above named, jointly and severally, do further hereby demur to said indictment and jointly and severally say that the said indictment is wholly insufficient in law, for
24 the following specifically stated reasons, and each of them, to wit:

First. That said indictment does not charge or set forth the commission of any crime or offense by the defendants, or either of them, known to or recognized or denounced by any statute or statutes or law of the United States.

Second. That the matters and things, and each and every of them, set forth and contained in said indictment do not charge the enter-

ing into by defendants, or either of them, of a criminal conspiracy, within the meaning of section 5440 of the Revised Statutes of the United States, or of any other statute or statutes of the United States.

Third. That there is no statute or statutes or law enacted by the Congress of the United States which prohibits or forbids the commission of any act or acts charged in said indictment to have been committed by these defendants, or either of them, or which creates or affixes any penalty for the commission of any such act.

Fourth. That it appears from the matters and things set forth and charged in said indictment that the lands involved in and affected by the alleged conspiracy were surveyed, vacant public lands of the United States, known as coal lands, not then otherwise
25 appropriated, occupied, or reserved, and not containing valuable minerals other than coal, and that the same were subject and open to entry and purchase at the land office at Durango, Colorado, as coal lands, and under the laws of the United States relating to the entry and purchase of coal lands.

And it does not appear, nor is it charged, that the several respective entrymen whom it is charged defendants conspired to induce to enter or purchase such lands were not each and all then and there fully and duly qualified under such laws to make entry or purchase thereof in the quantity contemplated to be taken by each respectively, nor is it charged that such alleged conspiracy contemplated or proposed that such entrymen, or any of them, should or would do any act or thing forbidden or prohibited by such or any statutes of the United States.

Fifth. That it appears from the allegations of the said indictment that the alleged conspiracy was merely to induce certain persons duly and legally thereunto qualified and entitled under the law to make entries of surveyed, vacant, not then otherwise appropriated, occupied, or reserved public coal lands, not containing valuable minerals other than coal, in quantities not exceeding the quantity allowed by law to each of such persons, respectively, and at the prices fixed by law, and that such alleged conspiracy contemplated only the
26 exercise by each of said persons of a legal right given them, respectively, by the laws relating to the entry and purchase of such lands and not the commission of any act denounced or forbidden by any statute.

Sixth. That it is not sufficiently charged in said indictment how or in what manner the action of the register was or could be, or was intended or proposed to be, affected or influenced by the, or any of the, alleged false, fraudulent, or fictitious statements or representations which it is alleged defendants conspired to procure to be made; or how any such matters were or became material as affecting either the action of such register, or the disposition of said lands, or the right of said several respective persons or entrymen to purchase or acquire title to the same.

Seventh. That it is not sufficiently charged in said indictment how in *in* what manner the United States was or could be de-

frauded or injured by any act done or contemplated to be done by said alleged conspiracy, it appearing from the allegations of the said indictment that the lands were properly subject to entry in manner and under the laws as contemplated, and that it was only contemplated or agreed that the several respective entrymen should enter and acquire a quantity not exceeding the quantity allowed by
27 the law to each, respectively, and that each should pay the receiver therefor the price fixed by law, and it not being charged that said several entrymen were not duly and legally qualified and entitled to make entry of such quantity of such lands at said price, under said laws, or that any other person or persons then or at any time ever claimed or sought the right to enter or acquire title to such lands.

Eighth. That the allegations of said indictment which attempt to charge a conspiracy by the defendants to make false, fictitious, illegal, and fraudulent entries at the land office at Durango of certain tracts of coal lands by making representations and statements of facts to the register which would be known by the defendants to be false, fictitious, fraudulent, and illegal in certain material matters, and thereby cause the register to act otherwise than he would or lawfully could act were he aware of such falsity, fraud, and illegality in said statements and representations, and to accept such entries and make sales to such entrymen, are wholly insufficient and uncertain in this, to wit:

That under the provisions of the coal-land laws of the United States such lands could lawfully be entered and purchased at the price fixed by law and in quantities as fixed by law by any person of
28 the requisite age and citizenship who had not theretofore exercised the right of purchase, without any restrictions or conditions being imposed by law on the exercise of such right other than an application to the register and the payment to the receiver of the price therefor; and it was and is wholly immaterial who furnished the money to make such payment, or whether the entryman was purchasing for himself or whether he was then in actual possession of the land, or whether he was personally acquainted with the character thereof; or whether he had frequently or at all passed over the same; or whether he had located or opened a valuable coal mine thereon, it appearing from the allegations of the indictment that said land was surveyed, vacant, unreserved, public lands containing valuable deposits of coal, but not containing any valuable deposits of mineral other than coal, and it not appearing that there was any other adverse applicant or claimant for any part thereof.

Ninth. That the said indictment fails to inform these defendants of the nature and cause of the accusation against them with the certainty, definiteness, and particularity required by the sixth amendment to the Constitution of the United States in this, to wit:

That it does not nor does any of its allegations inform
29 these defendants how it was proposed the United States should be or how it could be defrauded by the commission of any of

the acts which it is alleged generally the defendants conspired to do or cause to be done, it appearing that the lands involved were vacant, public coal lands, subject to entry and purchase under the coal-land laws by any qualified person, and it appearing that the alleged conspiracy only contemplated the entry or purchase of such lands by persons legally qualified and entitled to make such entry and purchase in quantities not exceeding the quantity allowed by law to each of such persons, respectively, and at and for the price fixed by law providing for and regulating such entries, and that there is no law requiring any such applicant to make any statements or representations to any officer or to make any showing except that he was of requisite age and citizenship and that he had not theretofore had the benefit of an entry under said laws.

Tenth. That the said indictment and the allegations thereof fail to inform defendants of the nature and cause of the accusation against them with the certainty and particularity required by the sixth amendment to the Constitution of the United States in this, to wit:

That it fails to inform them what provisions of the statute or statutes relating to such entries or what statute or law of the
30 United States it is contended was violated or proposed to be violated by or in the commission of any of the acts which it is alleged defendants conspired to do or procure to be done; or wherein the said acts, or any of them, were unlawful; or how or by virtue of what law the alleged false or fraudulent statements or representations which it is alleged defendants conspired to cause to be made were necessary or material to the right of the entrymen, or any of them, to make such entries or purchase; or how such statements or representations could or were intended to affect the action of any officer with reference to the disposition of said lands; or how the making of any such statements or representations or a conspiracy to cause them to be made was necessary to or involved in any agreement or combination to secure the entry of said lands or to obtain title thereto; or to show how or why the entries which it is alleged defendants conspired to make or procure to be made were false, fraudulent, or fictitious, or were proposed to be false, fraudulent, or fictitious entries; or to show how or in what manner the alleged conspiracy was or became a criminal conspiracy under or within the meaning of section 5440 of the Revised Statutes of the United States or any other statute or law of the United States; or to designate or describe with sufficient
31 certainty or particularity the overt act or acts in furtherance of or to effect the object of such alleged conspiracy which are or will be relied upon by the Government.

Eleventh. That said indictment further fails to inform the defendants of the nature and cause of the accusation against them with the certainty and particularity required by the sixth amendment to the Constitution of the United States in this, to wit:

That it fails to inform defendants what the statements and affidavits called "declaratory statement," "power of attorney," "nonmineral affidavit," "corroboratory nonmineral affidavits," and "applica-

tion at purchase," or any of them, mentioned in the so-called overt acts numbered 1, 2, 3, 4, 5, 6, and each of them, and which it is alleged defendants delivered to the register for filing, were, or what they contained, or by whom executed, or when executed, or any description by which they, or any of them, can be identified; and further that said indictment fails to inform defendants how or in what manner their said filing did or could or was intended to affect the alleged object of said alleged conspiracy or was, or was intended to be, in furtherance thereof.

32 Also in that the said indictment fails to inform the defendants what the alleged and called "nonmineral affidavit," mentioned in so-called overt acts No. 7, 10, 12, and each of them, and alleged to have been made by the defendant Charles E. Herr, or any of such affidavits, was, or what it contained, or the date thereof, or to sufficiently identify same, or any of them, and fails to inform the defendant how or in what manner the making or filing thereof, or any of them, could or did, or was intended to, effect the object of said alleged conspiracy or be in furtherance thereof.

Also that the said indictment fails to inform the defendants what the so-called "corroborating nonmineral affidavit" mentioned in so-called overt act No. 8 was, or what it contained, or the date thereof, or sufficiently to identify the same or to inform defendants how or in what maner the making or filing of the same did or could or was intended to effect the object of said alleged conspiracy or be in furtherance of the same.

Also that said indictment fails to inform the defendants what the so-called "corroborating nonmineral affidavit" mentioned in so-called overt act No. 9 was, or what it contained, of the date thereof, or to sufficiently identify the same, or to inform defendants how or in what manner the making or filing thereof could or did or

33 was intended to effect or further the object of said alleged conspiracy.

Also that the said indictment fails to inform defendants what the so-called "nonmineral affidavits," or any of them, mentioned in overt acts numbered 11, 14, and 16, and alleged to have been made by Charles E. Mumma, were, or what they, or any of them, contained, or what was the date of them, or any of them, or to sufficiently identify the same, or either of them, or to show how or in what manner the making or filing of them, or either of them, did or could or was intended to effect or further the object of said alleged conspiracy.

Also that the said indictment fails to inform defendants how the letters alleged to have been written by Charles E. Herr and mentioned in so-called overt acts numbered 13 and 15, or either of them, are or were connected with the alleged conspiracy, or how or in what manner the writing or deposit of them, or either of them, in the mails was unlawful, as alleged, or how or in what manner it is claimed or will be contended the writing or mailing of them, or

either of them, was an act done to effect the object of said alleged conspiracy or in furtherance of the same, or how such writing or mailing did or could or was intended to effect or further the object of said alleged conspiracy, it being apparent from the face
34 thereof that neither the writing nor mailing of such letters, or either of them, was an act done or intended to induce the parties to whom they are alleged to have been sent, or either of them, to do any act or take any step in the matter of the alleged conspiracy, or to induce or influence any action by any person in furtherance of the object of the alleged conspiracy; nor does said indictment inform these defendants as to whether it is proposed to show that the persons to whom it is alleged such letters were written or sent, or either of them, were connected with the alleged conspiracy as coconspirators, agents, entrymen, or otherwise, or as to what accusation or claim is to be based, in whole or in part, upon the alleged writing or mailing of said letters, or either of them.

Also that the said indictment fails to inform defendants what was the nature or contents of the so-called "relinquishment" mentioned in paragraph or so-called overt act number 17, or to whom it ran or how or to whom it relinquished the right of said James H. Lloyd, or for what purpose it was executed, or in what manner or proceeding used or intended to be used, or to identify or describe the same or the alleged purpose thereof, or to show where it was used or intended to be used, or to show how or in what manner the making of the same or any use or intended use thereof did or could or was intended to effect or further the object of said alleged
35 conspiracy, or how or in what manner it was related or connected therewith, or with the object or purpose thereof; and fails to inform the defendants what claim or accusation is or will be based, in whole or in part, upon the alleged making or any use or intended use of said so-called relinquishment.

It appearing that the lands affected by said so-called relinquishment and described in said number 17 are no part of the lands mentioned and described in overt acts numbered from 1 to 6, inclusive, of said indictment, the last-mentioned lands being the lands, and the only lands, which are alleged to have been involved in or affected by the alleged conspiracy charged against defendants.

Also that said indictment fails to inform defendants how or for what reason it is or will be claimed it was or is unlawful for defendants to enter upon the lands as in paragraph or overt act numbered 18 mentioned, or to open up a mine or mines of coal thereon or discover deposits of coal, or of what such alleged unlawful acts consisted, or how or in what manner said alleged acts, or any of them, were or could be, or were intended to be, in furtherance of or to effect the object of said alleged conspiracy.

36 It not appearing from the allegations of said indictment that such entry and opening of such mine or deposit of coal was connected with the purchase of said lands by said several entrymen, and such development not being necessary to or made for the

purpose of such entry or purchase, and it not appearing how such entry was unlawful as alleged, or how it could or did or was intended to further or effect the object of the alleged conspiracy.

And further in that the said indictment fails sufficiently to inform the said defendants as to the facts with reference to the so-called overt acts, or any of them, so that defendants may know what act or acts it is or will be claimed they have done or caused to be done to effect the object of the alleged conspiracy within the meaning of section 5440, R. S., and so to be prepared to meet the accusation to be made against them, and fails to show how it is proposed to connect such acts, or any of them, with the alleged conspiracy or to show that they could or were intended to further or effect the object thereof.

Twelfth. Those portions of said indictment wherein certain alleged overt acts are sought to be set out, and numbered paragraphs or
37 overt acts 13 and 15, and each of them, wherein it is attempted to be charged that the defendant, Charles E. Herr, did write and mail the letters therein set out, in pursuance of and to effect the object of the said conspiracy, are insufficient and wholly irrelevant and immaterial, for the following reasons:

Because it does not appear from the said letters, or either of them, or from any allegations in said indictment contained, that said letters, or either of them, were related to or connected with or referred to the alleged conspiracy, or any matter involved therein, or any object or purpose thereof, or that they, or either of them, were written or mailed in pursuance of or to effect or further any object thereof.

Because it appears that the said letters, and each of them, were written and mailed after the alleged conspiracy had been consummated and terminated.

Because it appears from the face thereof that said letters could not and were not, nor could or was either of them, be written or mailed to procure or induce any action by any person or persons in any matter connected with or related to the alleged conspiracy, or to influence or affect any result to be obtained thereby, or in any manner to attain or further the object thereof.

38 Because neither the writing nor mailing of said letters, or either of them, appears to have been an act done to affect the object of said alleged conspiracy within the meaning of section 5440 of the Revised Statutes or of any other statute.

Thirteenth. That portion of said indictment numbered 17, [illegible] wherein it is attempted to be charged that the defendant, Charles E. Herr, as an alleged overt act did procure one James H. Lloyd to execute a certain "relinquishment" is insufficient and wholly immaterial and irrelevant for the following reasons:

Because it appears upon the face of the said indictment that the lands described in and affected by said alleged relinquishment were not embraced in or a part of the lands involved in said alleged conspiracy, and it does not appear that any action which was or might have been taken or contemplated with reference to said relinquish-

ment or the lands affected thereby could have in any manner affected any matter involved in said alleged conspiracy or aided, or been intended to aid, in effecting the object thereof.

Because it appears that the only effect which could have been accomplished, or intended to be accomplished, by the execution
39 of said alleged relinquishment was to release or surrender to the United States any claim or right which the said Lloyd might have or claim in or to said lands in said relinquishment described.

And it does not appear from any allegation in said indictment contained that any other or further purpose was sought to be affected or furthered thereby.

Because it does not in any manner appear that the procuring or execution of said relinquishment was an act done to effect the object of such alleged conspiracy within the meaning of section 5440 of the Revised Statutes or of any other statute.

Fourteenth. That portion of said indictment numbered 18 wherein it is attempted to be charged that the defendant, George C. Franklin, and the alleged agent, Charles C. Mumma, as an alleged overt act, went upon the lands described in overt acts numbered from 1 to 6, inclusive, and located a mine of coal thereon and did labor to discover deposits of coal, is insufficient and wholly irrelevant and immaterial for the following reasons:

Because it does not appear from any sufficient allegations of fact in said indictment contained how or in what manner such
40 act or acts, or any of them, were connected with the matters of said alleged conspiracy, or how or in what manner such acts, or any of them, did or could or were intended to further or effect the object of such alleged conspiracy.

Because it does not appear from any allegation of fact how such acts, or any of them, were unlawful or for what purpose the said were done.

Because it does not in any manner appear that said acts, or any of them, were done to effect the object of said alleged conspiracy within the meaning of section 5440 of the Revised Statutes or of any other statute.

Fifteenth. That there is no sufficient allegation or allegations of fact in said indictment from which it appears that any of the acts alleged to have been done or procured by the defendants, or either of them, was done or procured to effect the object of said alleged conspiracy. The allegation of the mere legal conclusion as to each of such acts, that it was done in pursuance of said alleged conspiracy and to effect the object of the same, not being supported or warranted by any allegation or allegations of fact in said indictment contained, and said indictment wholly failing to allege the purpose for which any such act was done or how it tended to or was designed to promote or effect the object of the conspiracy, or that any such act was necessary or material to any steps in the formation
41 or completion of the conspiracy, and it not appearing in the face thereof how any such act is or was an act done to effect

the object of such alleged conspiracy within the meaning of section 5440 of the Revised Statutes.

That such alleged acts, and each of them, are wholly immaterial and irrelevant in the absence of such allegations of fact.

And for other good and sufficient reasons appearing of record.

Wherefore, for want of a sufficient indictment in this behalf, the said defendants, and each of them, jointly and severally pray judgment, that by the court the said defendants, and each of them, may be dismissed and discharged from the said premises in the said indictment specified.

RITTER & BUCHANAN,
Attorneys for Defendants.

DURANGO, COLO.

(Endorsed:) No. 2030. U. S. Dist. Ct. United States *vs.* Charles E. Herr, Geo. C. Franklin. Joint and several demurrers to indictment. Filed Nov. 9, 1907, Charles W. Bishop, clerk. Ritter & Buchanan, attys.

Twenty-sixth day, November term, Thursday, December 5th, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

42 THE UNITED STATES OF AMERICA *vs.* CHARLES E. HERR AND GEORGE C. FRANKLIN. } 2030. Indictment for conspiracy.

At this day comes Ernest Knaebel, esquire, and Frank Hall, esquire, assistants to the Attorney-General, who prosecute the pleas of the United States in this behalf, and the defendants, by Benjamin W. Ritter, esquire, their attorney, also come. And the joint and several demurrer to the indictment herein coming on now to be heard is argued by counsel and by the court taken under advisement.

Forty-first day, November term, Monday, December 30th, A. D. 1907.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* CHARLES E. HERR AND GEORGE C. FRANKLIN. } 2030. Indictment for conspiracy.

At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the joint and several demurrer of the defendants
43 to the indictment herein having heretofore come on to be heard, and having been argued by Ernest Knaebel, esquire, and Frank Hall, esquire, assistants to the Attorney-General, and

by Benjamin W. Ritter, esquire, attorney for the defendants, and having been taken under advisement, and the court having considered the same and being now fully advised in the premises, it seemeth to the court now here that the indictment herein is not sufficient in law to be answered unto, and so the demurrer is hereby sustained.

To which order and ruling of the court the plaintiff excepts, and an exception is hereby allowed to it.

Forty-eighth day, November term, Wednesday, January 8th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA, *vs.* CHARLES E. HERR AND GEORGE C. FRANKLIN.	2030. Indictment for conspiracy.

At this day comes Ernest Knaebel, esquire, special assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendants, by Benjamin W. Ritter, esquire, their attorney, also come. And the joint and several demurrer of the de-
44 fendants to the indictment having heretofore and on, to wit, the thirtieth day of December last, at this same term, been ordered sustained for the reasons and upon the grounds, and none other, set forth and explained in the opinions of the court filed, respectively, on that day in this case and in case number 2022 in this court, between the United States of America and F. W. Keitel and others, in so far as the latter opinion expressly relates to the first count in the indictment in the cause last mentioned:

It is now considered, ordered, and adjudged by the court that, upon the same grounds and for the same reasons in the said opinions expressed, and none other, the defendants of and from the premises in this said indictment specified be discharged and go hence hereof without day.

It is further ordered by the court that if the United States shall sue out a writ of error to the Supreme Court of the United States from this order and judgment the defendants shall each enter into a personal recognizance before an United States commissioner in the sum of one thousand dollars ($1,000) conditioned that he shall personally appear in this court on the first day of the next term thereof at Denver, and from day to day and from term to term thereafter, and answer the indictment herein if the judgment herein shall be reversed
45 by the said Supreme Court, and until such recognizances shall have been duly executed and filed with the clerk of this court the existing recognizances now on file in this case shall be and remain binding upon the defendants and their respective sureties.

To which order and judgment the plaintiff then and there, at the time thereof, excepted, and an exception was allowed to it.

46 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
CHARLES E. HERR AND GEORGE C. FRANKLIN, DEFENDANTS. } No. 2030.

Bill of exceptions.

Be it remembered that on the 9th day of November, 1907, in this cause the defendants filed their demurrer to the indictment, which demurrer is in words and figures set forth in the transcript of the record proper of this cause, at pages 23 to 42 of such transcript, as such transcript will be certified pursuant to the writ of error to be sued out by the United States to review the judgment and decision herein in the Supreme Court, and afterwards and on, to wit, the 5th day of December, 1907, the same being one of the regular juridical days of the November, 1907, term of this court, before the court, the Hon. Robert E. Lewis, district judge, presiding, N. C. Miller, esquire, and B. W. Ritter, esquire, appearing as counsel for the defendants, and Frank Hall, esquire, special assistant to the Attorney-General, appearing as counsel for the United States, this cause came on to be heard upon the indictment and the demurrer of the defendants thereto, and was argued by counsel.

And thereafter, on, to wit, the 30th day of December, 1907, of the same term, the court made its decision and order upon the mat-
47 ters so heard and argued, sustaining the said demurrer to the indictment, for the reasons and upon the grounds, and those only, which are set forth in a certain written opinion of the court then filed by the court in this cause, and in so much of a certain other written opinion of the court then filed by it in cause number 2022 in this court, entitled The United States *v.* F. W. Keitel et al., as expressly relates to the first count of the indictment in the cause last mentioned; the court not deeming it necessary to pass upon or consider other objections urged to the indictment; which opinions are respectively in words and figures as follows, to wit:

48 In the District Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES E. HERR AND GEORGE C. FRANKLIN, DEFENDANTS. } No. 2030. R. S. U. S., sec. 5440.

The indictment in this case charges that the defendants on January 1st, 1905, in this district "unlawfuly, corruptly, wickedly, and maliciously did conspire, combine, confederate, and agree together,

and with Charles C. Mumma and William S. Pickering, hereinafter referred to as agents of the said defendants, and also with divers other persons to the said grand jurors unknown, to induce, procure, and hire divers other persons, hereinafter called entrymen and mentioned by name as such in that part of this indictment within overt acts are charged to have been committed by the said defendants, being overt acts numbered from one to six, both inclusive, to make false, fictitious, illegal, and fraudulent entries at the land office of the said United States at Durango aforesaid of said tracts of coal lands of the said United States, "containing nine hundred and sixty acres,
49 of the value of $100,000, and at and in the making of such entries, powers of attorney, nonmineral affidavits, and affidavits at purchase, to make representations and statements of fact to the register of the said land office which would be known by the said defendants, agents, and entrymen to be false, fictitious, illegal, and fraudulent in certain material matters hereinafter specified, and thereby wrongfully and deceitfully to cause the said register to act in administrating the said laws and regulations in that behalf made in pursuance of law otherwise than he would or lawfully could act were he aware of such falsity, illegality, and fraud in such representations and statements; that is to say, cause the said register to accept such false, fraudulent, and illegal entries as though they were true, and make sales of such lands; it being the design of the defendants to furnish such entrymen with moneys necessary to make payment of the price of said lands as fixed by law and thereupon require conveyances from the said entrymen to the defendants or such corporations as they might designate; that the said lands were coal lands of the United States; that the said defendants and their said agents were, by promise and payment of reward to them in some small sum, the amount being unknown to the grand jurors, to induce, procure, and hire the said entrymen to make entries of the
50 said coal lands in quantity not exceeding the quantity allowed by law to them, respectively, in pursuance of certain agreements between the said defendants and the said entrymen in some cases, and between the said agents and the said entrymen in other cases, under which the said entrymen were severally to make, execute, and furnish to the said register all the necessary papers, affidavits, declarations, and statements required by the said laws and regulations from such entrymen in connection with such entries, and among other declarations a statement to the effect that each of such entrymen was then purchasing and intending to purchase his respective tract of such land for himself, that he was in the actual possession of the same, that he was acquainted with the character thereof, that he had located and opened a valuable coal mine on the same, whereas, in truth, said entryman would then know that he would not then be purchasing or intending to purchase such land for himself at all, would not be in the actual possession of the same, would not be acquainted with the character of the land, had never passed over the same, would not have opened or located any mine of coal, and

would be purchasing and intending to purchase his tract for the use of the particular defendant or agent of the said defendants with whom he would be dealing under his particular agreement, and that under said agreements said entrymen were required to make
51 conveyances of said coal lands to the defendants or some corporation to be designated.

The indictment then proceeds to set forth eighteen overt acts.

The first overt act charges that the defendants on January 31st, 1906, did deliver to the register of the land office at Durango for filing in the matter of coal cash entry No. 83, of one John R. Pickerill, for certain lands there described, the documents, statements, and affidavits required by law and the regulations of the General Land Office, to wit, declaratory statement, power of attorney, nonmineral affidavit, corroborating nonmineral affidavit, and application at purchase.

The second overt act is of like date and character in coal cash entry No. 80, of one Elmira Pickerill.

The third overt act is of like date and character in coal cash entry No. 81, of one Julian Lloyd.

The fourth overt act is of like date and character in coal cash entry No. 78, of one Sarah Minnick.

The fifth overt act is of like date and character for coal cash entry No. 79, of one Florence Garman.

52 The sixth overt act is of like date and character for coal cash entry No. 82, of one William H. Mumma.

The seventh overt act is of like date, but charges that the defendant Herr did then and there make a certain nonmineral affidavit in the matter of the coal cash entry of John R. Pickerill.

The eighth overt act is of like date and charges that both defendants did then and there procure one Charles C. Mumma to make a certain corroborating nonmineral affidavit in coal cash entry of John R. Pickerill and file the same with the register.

The ninth overt act charges that the defendant Franklin on January 30th, 1906, did make a certain corroborating nonmineral affidavit in the matter of the coal cash entry of said Pickerill and caused the same to be filed with the register.

The tenth overt act charges that the defendant Herr on January 31st, 1906, did make a nonmineral affidavit in the coal cash entry of Elmira Pickerill and did file the same with the register.

The eleventh overt act charges that both defendants on January 31st, 1906, induced one Mumma to subscribe his name to a nonmineral affidavit in the coal-land entry of Elmira Pickerill.

53 The twelfth overt act charges that the defendant Herr on January 31st, 1906, did make a certain nonmineral affidavit in the coal entry of Sarah Minnick and file the same with the register.

The thirteenth overt act charges that the defendant Herr on February 10th, 1906, did write a certain letter to one Sarah Minnick at Dayton, Ohio, to wit:

"DEAR AUNT: I have herewith enclosed you draft for $100. I also enclose receipt for $3,300, which you will please sign and return

to me. The $100 is profit due you, and the other $3,200 covers loan I made to you at the time of signing the papers, which has been paid off by C. C. Mumma."

The fourteenth overt act charges that the defendants on January 31st, 1906, did induce and persuade one Mumma to make a certain nonmineral affidavit in the coal-land entry of Florence Garman as a part of her entry.

The fifteenth overt act charges that the defendant Herr on February 10th, 1906, did write a letter to Mrs. Florence Garman of like character (the same being set out) to the one written to Sarah Minnick.

The sixteenth overt act charges that the defendants on January 31st, 1906, did induce and procure one Mumma to make a nonmineral affidavit in the coal-land entry of one Julian Lloyd.

54 The seventeenth overt act charges that the defendant Herr on October 23rd, 1905, at Dayton, Ohio, did induce one Lloyd to execute a certain relinquishment relinquishing his right, title, and interest in the lands covered by his entry of coal lands made by him in 1904.

The eighteenth overt act charges that the defendant Franklin on February 1st, 1905, and at divers times thereafter, did lawfully go upon each and every tract of coal lands described in this indictment in overt acts and locate and open a mine of coal thereon for the purpose of discovering deposits of coal on said land.

The indictment attempts to charge a conspiracy under section 5440, R. S. U. S., and that section and the act of March 3, 1873, known as the coal-land act, will hereafter receive consideration.

Defendants have demurred to the indictment.

For reasons given on consideration of the first count in case No. 2022, United States of America v. F. W. Keitel et al., and heretofore filed with the clerk, demurrer to this indictment is sustained.

ROBT. E. LEWIS,
District Judge.

DEC. 30, 1907.

* * * * * * *

81 To which decision and order of the court so sustaining the said demurrer, for the reasons and upon the grounds in the said opinions so set forth, the United States, by its counsel, then and there duly excepted.

And thereafter, on the 8th day of January, 1908, of the same term, the court, pursuant to the aforesaid decision and order, and for the reasons and upon the grounds aforesaid in the said opinions set forth, made and entered its final order and judgment in this cause, sustaining the said demurrer and adjudging that the defendants of and from the premises in the indictment specified be discharged and go hence without day.

To which order and judgment of the court, and each and every part thereof, and particularly to the parts thereof so, for the reasons

and upon the grounds aforesaid, sustaining the said demurrer and adjudging that the defendants of and from the premises in the indictment specified be discharged and go hence without day, the United States, by its counsel, then and there duly excepted.

And forasmuch as the foregoing matters do not appear of record, the plaintiff tenders this its bill of exceptions, and prays that the same may be signed and duly authenticated and made a part of the record herein, which is accordingly done this 27th day of January, 1908.

ROBT. E. LEWIS,
District Judge.

Service of the foregoing bill of exceptions was made upon us this 25 day of January, 1908.

N. C. MILLER,
Attorneys for the Defendants in the Above-Entitled Cause.

O. K.—N. C. MILLER.

82 (Endorsed:) No. 2030. United States District Court, District of Colorado. The United States of America, plaintiff, v. Charles E. Herr and George C. Franklin, defendants. Bill of exceptions. Filed January 27, 1908, Charles W. Bishop, clerk.

83 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
CHARLES E. HERR AND GEORGE C. FRANKLIN, defendants. } No. 2030.

Petition for writ of error.

And comes now the United States, plaintiff herein, and says that on the 30th day of December, 1907, this court made its decision holding insufficient and setting aside the indictment in this cause, and that thereafter and on the 8th day of January, 1908, this court, pursuant to that decision, entered judgment herein in favor of the defendants and against this plaintiff, in which judgment and decision certain errors were committed to the prejudice of this plaintiff, and of such a character as to entitle this plaintiff, under the law, to review the said judgment and decision in the Supreme Court of the United States by writ of error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the

correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

84 RALPH HARTZELL,
Ass't & Acting United States Attorney
for the District of Colorado.
ERNEST KNAEBEL,
Special Assistant to the Attorney-General,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Colorado, ss:

Upon reading and filing the foregoing petition and the assignment of errors therein referred to it is ordered that the petition be, and the same hereby is, allowed and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district, under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

Dated Denver, Jan'y 27th, 1908.

ROBT. E. LEWIS,
District Judge.

(Endorsed:) No. 2030. United States District Court, District of Colorado. The United States of America, plaintiff, *v.* Charles E. Herr et al., defendants. Petition for writ of error. Filed Jan. 27, 1908. Charles W. Bishop, clerk.

85 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
CHARLES E. HERR and GEORGE C. FRANKLIN, defendants. } No. 2030.

Assignment of errors.

Comes now the United States of America, plaintiff in the above-entitled cause, and files this assignment of errors to the judgment heretofore entered by the District Court for the District of Colorado in the above-entitled cause, to wit:

First. The District Court for the District of Colorado erred in sustaining the joint and several demurrer of the defendants to the indictment and in rendering judgment for the defendants.

Second. The said District Court erred in sustaining the said demurrer and rendering the said judgment upon and because of an erroneous construction of section 5440 of the Revised Statutes as amended (21 Stat. L., p. 4), whereby the said District Court in substance and effect held that the scheme and conspiracy in the

86 indictment described would, if carried out, work no defrauding of the United States within the meaning of that statute, although such scheme and conspiracy so described contemplated and intended, and for its effectuation necessarily involved, both the obtaining from the United States of valuable coal lands in excess of the quantity allowed by law and the accomplishment of that result by deceiving the officials of the Land Department through the making of false representations of material facts and the creation through conduct and concealment of false and deceptive appearances, all tending, and by the conspirators designed, to induce such officials to believe to be lawful and bona fide, and therefore to act favorably upon, applications to enter coal lands, which in fact would be fraudulent and unlawful.

Third. The said District Court erred in omitting to follow and apply the decision of the Supreme Court in United States vs. The Trinidad Company. (137 U. S., 161.)

Fourth. The said District Court erred in its construction of section 5440 of the Revised Statutes as amended in holding that the word "defraud" therein refers solely to such frauds as at common law were punished as substantive, independent criminal offenses.

Fifth. The said District Court erred in holding that the conspiracy described in the indictment is not such as at common law and tested by common-law principles and precedents without more would have been punishable as a criminal conspiracy.

Sixth. The said District Court erred in misconstruing section
87 5440 of the Revised Statutes as amended in connection with the general definition of conspiracy given in Pettibone v. United States (148 U. S., 197), so as to limit and restrain the application of that statute to conspiracies to commit substantive, independent criminal offenses against the United States and conspiracies to defraud the United States necessarily involving the commission of such substantive, independent criminal offenses.

Seventh. The said District Court erred in its construction of section 5440 of the Revised Statutes as amended in holding that no agreement or conspiracy is within the denunciation thereof which does not contemplate and involve the perpetration of some act either amounting to an independent crime under some other act of Congress or unlawful in the restricted sense of being an act distinctly and specifically prohibited by some other act of Congress.

Eighth. The said District Court erred in sustaining the said demurrer and rendering the said judgment upon the basis of and because of the erroneous statutory constructions indicated in the second, fourth, sixth, and seventh specifications of this assignment of errors.

Ninth. The said District Court erred in holding that the facts set forth in the indictment in this case, although sufficient to justify a court of equity in setting aside for fraud, at the suit of the United States, patents for coal lands obtained in the manner stated in said indictment, do not amount to a fraud upon the United States within

the meaning of section 5440 of the Revised Statutes as amended, making it an offense for two or more persons to conspire to defraud the United States in any manner or for any purpose.

Wherefore the United States of America prays that the judgment of the District Court of the United States for the District of
88 Colorado be reversed, and that the said District Court be directed to reinstate the said indictment and proceed with the trial of the cause.

RALPH HARTZELL,
Assistant and Acting United States Attorney for the District of Colorado.
ERNEST KNAEBEL,
Special Assistant to the Attorney-General.

(Endorsed:) No. 2030. In the U. S. District Court. The United States of America, plaintiff, *vs.* Charles E. Herr and George C. Franklin, defendants. Assignment of errors. Filed Jan. 27, 1908, Charles W. Bishop, clerk. Earl M. Cranston, U. S. attorney for the District of Colorado.

Fifty-seventh day, November term, Monday, January 27th, A. D. 1908.

Present: The Honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* CHARLES E. HERR ET AL. } 2030. Indictment for conspiracy.

Upon reading and filing the foregoing petition and the assignment of errors therein referred to,

It is ordered that the petition be, and the same hereby is, allowed and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

89 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States for the District of Colorado.

UNITED STATES *versus* CHARLES E. HERR ET AL. } No. 2030.

The clerk will issue a complete transcript of the record in the above-entitled cause, said transcript to contain indictment, all demurrers, and all orders of court, together with the opinion of the court in this case and in case No. 2022.

EARL M. CRANSTON,
Attorney for U. S.

To CHARLES W. BISHOP, Clerk,
Denver, Colorado, Jan. 4, 1908.

(Endorsed:) No. 2030. United States District Court for the District of Colorado. U. S. *versus* Charles E. Herr et al. Præcipe for transcript of record. Filed Jan. 4, 1908, Charles W. Bishop, clerk. Earl M. Cranston, attorney for U. S.

90 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Colorado, greeting:

Because in the decision, record, and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between the United States of America, plaintiff, and Charles E. Herr and George C. Franklin, defendants, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of January, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] CHARLES W. BISHOP,
Clerk of the Circuit Court of the United States
for the District of Colorado.

Allowed by—
ROBT. E. LEWIS,
Judge of the United States District Court
for the District of Colorado.

91 *Return.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ I herewith transmit to the honorable the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said United States District Court for the District of Colorado, at Denver, in said district, this first day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

92 (Indorsed:) No. 2030. United States District Court, District of Colorado. The United States of America, plaintiff, *v.* Charles E. Herr et al., defendants. Writ of error. Filed in United States District Court, District of Colorado, January 27, 1908. Charles W. Bishop, clerk.

93 UNITED STATES OF AMERICA, *ss:*

To Charles E. Herr and George C. Franklin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Colorado, sitting at Denver, wherein the United States is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert E. Lewis, judge of the District Court of the United States for the District of Colorado, this 27th day of January, in the year of our Lord one thousand nine hundred and eight.

ROBT. E. LEWIS,
Judge of the District Court of the United States for the District of Colorado.

I hereby acknowledge service of the foregoing citation this 28th day of January, 1908.

N. C. MILLER,
Attorney for Defendants.

(Indorsed:) 2030. U. S. District Court, District of Colorado. The United States of America *v.* Charles E. Herr and George C. Franklin. Citation. Filed Jan. 28, 1908. Charles W. Bishop, clerk.

93½ UNITED STATES OF AMERICA, *ss:*

To Charles E. Herr and George C. Franklin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Colorado, sitting at Denver, wherein the United States is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert E. Lewis, judge of the District Court of the United States for the District of Colorado, this 27th day of January, in the year of our Lord one thousand nine hundred and eight.

(Signed) ROBT. E. LEWIS,
Judge of the District Court of the United States for the District of Colorado.

We hereby acknowledge service of the foregoing citation this 30th day of January, 1908.

RITTER & BUCHANAN,
Attorneys for the defendants.

(Indorsed:) No. 2030. U. S. District Court, District of Colorado. United States *v.* Charles E. Herr, et al. Copy of Citation. Filed Feb. 4, 1908. Charles W. Bishop, clerk.

94 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to eighty-nine (89), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings and other matters set forth in the præcipe filed herein, together with a true copy of such præcipe and bill of exceptions, petition for writ of error and assignments of error, and judgments, and all other matters (exclusive of bench warrants, recognizances, and briefs) heretofore filed or entered of record in said court, and in a certain case lately in said court pending wherein the United States of America was plaintiff and Charles E. Herr and George C. Franklin were defendants, as fully and completely as the same still remain on file and of record in my office at Denver.

And I further certify that I have annexed to and transmit herewith a copy of all opinions heretofore handed down and filed in the above-entitled case and in case No. 2022, wherein the United States of America was plaintiff and F. W. Keitel and others were defendants.

In testimony to the above I do hereunto sign my name and affix the seal of said court at the city and county of Denver, in said district, this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

* * * * * * *

130 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from ninety-five (95) to one hundred

thirty (130) to be a true, perfect, and complete transcript and copy of all opinions heretofore handed down and filed in said court and in two certain cases lately in said court pending wherein the United States of America was plaintiff and Charles E. Herr and George C. Franklin were defendants; and the United States of America was plaintiff and F. W. Keitel and others were defendants, respectively, as fully and completely as the same still remain on file in my office at Denver.

In testimony to the above I do hereunto sign my name and affix the seal of said court at the city and county of Denver, in said district, this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

132 In the Supreme Court of the United States, October term, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES E. HERR AND GEORGE C. FRANKLIN. } No. 630.

Stipulation.

It is hereby stipulated by counsel for the parties to the above-entitled cause that in the printing of the transcript of the record herein the clerk of the Supreme Court shall omit pages 95 to 101, inclusive, being a repetition of the opinion of the court herein, which appears elsewhere in the transcript of the record, to wit, at pages 48 to 54, inclusive; also omit pages 55 to 80, inclusive, and pages 102 to 130, inclusive, being the opinion of the court in the case of The United States v. F. W. Keitel et al, which is printed in the transcript of the record in that case.

H. M. HOYT,
Solicitor-General.
N. C. MILLER,
Counsel for Defendant in Error.

FEBRUARY, 1908.

133 (Indorsed:) File No. 21033. Supreme Court U. S. October term, 1907. Term No. 630. The United States, P. E., vs. Charles E. Herr et al. Stipulation to omit part of record in printing. Filed Feb. 29, 1908.

134 (Indorsement on cover:) File No. 21033. Colorado, D. C. U. S. Term No. 630. The United States, plaintiff in error, vs. Charles E. Herr and George C. Franklin. Filed February 19th, 1908. File No. 21033.

O

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1907.

No. 631.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES E. HERR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

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1 Pleas in the District Court of the United States for the District of Colorado sitting at Denver.

Be it remembered that heretofore and on, to wit, the twenty-second day of June, A. D. 1907, the same being one of the regular juridical days of the May term, A. D. 1907, of said court, present, the honorable Robert E. Lewis, district judge, the following proceedings were had and entered of record in said court, to wit:

In the matter of the grand jury.

At this day come the members of the grand jury, heretofore duly empanelled and sworn as grand jurors, and return into court now here the following true bills of indictment, to wit:

* * * * * * *

THE UNITED STATES OF AMERICA, *vs.* CHARLES E. HERR.	2032. Indictment for making false proofs before land office.

(Endorsed:) A true bill. (Signed) E. D. Welker, foreman.

And thereupon it is ordered by the court that a bench warrant issue without delay against the defendant and returnable forthwith; and that the defendant be let to bail before an United States commissioner in the sum of five thousand dollars ($5,000) for his appearance in this court from day to day and term to term to answer unto the indictment herein.

* * * * * * *

2 And said indictment is in words and figures as follows, to wit:

In the District Court of the United States of America for the District of Colorado, of the May term in the year nineteen hundred and seven.

UNITED STATES OF AMERICA,
District of Colorado, ss.

At the May term of the District Court of the United States of America, within and for the District of Colorado, begun and held in the city of Denver, in said district, on the seventh day of May, nineteen hundred and seven, the grand jurors of the United States of America, within and for said district, having been duly empanelled, sworn, and charged to inquire into and true presentment make of all offences committed within said district against the laws of the United States of America, upon their oaths aforesaid, in the name and by the authority of the United States of America, do find and present:

That one Charles E. Herr, late of Durango, in the said district, on the thirty-first day of January, in the year of our Lord nineteen hundred and six, at the said city of Durango, in the said District of Colorado, did unlawfully, knowingly, and willfully, by solicitation and inducement, procure one Florence Garman to make and
3 subscribe and present to the Secretary of the Interior of the said United States by and through the register and receiver of the United States land office at Durango, Colorado, and she, the said Florence Garman, did, in pursuance of such solicitation and inducement, thereupon on said thirty-first day of January, nineteen hundred and six, make and subscribe, and present to the said Secretary of the Interior by and through the said register and receiver of the said United States land office at Durango, Colorado, by and through her said agent and attorney in fact, Charles E. Herr, a certain false and fraudulent declaration in the form of an affidavit at purchase, pertaining to a certain matter hereinafter described, which was then and there a matter within the jurisdiction of the said Secretary of the Interior, that is to say, a declaration in the form of a coal land affidavit at purchase, of her, the said Florence Garman, partly written and partly printed, of the tenor which here follows:

COAL LAND AFFIDAVIT AT PURCHASE.

UNITED STATES LAND OFFICE,
Durango, Colorado.

I, Florence Garman, a single woman, whose post-office box is No. in Dayton, county of Montgomery, and State of Ohio, and whose actual residence is Dayton, county of Montgomery, and State of Ohio, and claiming under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of
4 the United States, and under coal land declaratory statement No. 756, filed in the land office aforesaid on the 8th day of November, A. D. 1905, by me, by Charles E. Herr, attorney in fact, the preference right of purchase to the W. ½ SE. ¼ of section 18, and W. ½ of NE. ¼ of section 19, in township 35 N. of range 10 W. of the N. M. P. M., subject to sale at the land office at Durango, Colorado, do solemnly swear that I am over twenty-one years of age, and a native born citizen of the United States; that I have never had the right of purchase under the aforesaid provisions of law, either as an individual or as a member of an association, and that I have never held any other lands under its provisions. I further swear that I and my grantor have expended in developing coal mines on said tract, in labor and improvements, the said of fifty ($50.00) dollars, the nature of said improvements being as follows: Surveying, prospecting, and an open cut uncovering a vein of coal that I have caused to be located and opened a mine of coal thereon. That I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indi-

rectly for the use and benefit of any other party; and I do further swear that I am not well and personally acquainted with the character of said described lands, and with each and every legal subdivision thereof, not having frequently passed over the same; that my knowledge of said lands is not such as to enable me to testify understandingly thereto; that a nonmineral affidavit is attached hereto, sworn to by Charles E. Herr, my duly authorized agent; that said tract, and each and every legal subdivision, is chiefly valuable for coal, and more valuable for coal mining than for agricultural purposes; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge,
5 any valuable deposit of gold, silver, copper, or mineral other than coal. So help me God.

FLORENCE GARMAN.

STATE OF OHIO,
County of Montgomery, ss.

I hereby certify that the foregoing application was subscribed and sworn to before me and in my presence by the above applicant (who is personally known to me) this 25th day of January, A. D. 1906, at my office at Dayton, Ohio.

My commission expires Aug. 30, 1908.

W. A. BUDROE,
Notary Public.

Which said declaration then and there contained, amongst other things, certain statements material to the said matter within the jurisdiction of the said Secretary, that is to say, that she, the said Florence Garman, was then and there claiming said land above described under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, and under coal land declaratory statement number seven hundred and fifty-six, filed in the land office at Durango aforesaid, on the eighth day of November, nineteen hundred and five, by her, the said Florence Garman, by and through Charles E. Herr, her attorney in fact, the preference right of purchase to the lands first above described, that she, the said Florence Garman, never had the right of purchase under the aforesaid provisions of law, either as an individual or as a member of an association, and that she had never held any other lands under
6 its provision, and that she, the said Florence Garman, and her grantor had expended in developing coal mines on said tract, in labor and improvements, the sum of fifty dollars, the nature of said improvements being as follows: Surveying, prospecting, and an open cut uncovering a vein of coal; that she had caused to be located and opened a mine of coal on said land; and that she, the said Florence Garman, was then and there in the actual possession of the said mines, and made the entry for her own use and benefit, and not directly of indirectly for the use and benefit of any other party; the said state-

ments in the said declaration then and there being material in the matter aforesaid in this, that it was necessary, in order to the due administration of the said laws by them, the said Secretary of the Interior and the said register and receiver of said land office, should thereby be truly informed whether or not the said Florence Garman was then and there claiming said land above described under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States and under coal land declaratory statement number seven hundered and fifty-six, filed in the land office at Durango aforesaid, on the eighth day of November, nineteen hundred and five, by her, the said Florence Garman, by and
7 through Charles E. Herr, her attorney in fact, the preference right of purchase to the lands first above described, whether or not she, the said Florence Garman, never had the right of purchase under the aforesaid provisions of law either as an individual or as a member of an association, and whether or not she had never held any other lands under its provisions, and whether or not she, the said Florence Garman, and her grantor had expended in developing coal mines on said tract in labor and improvements the sum of fifty dollars, the nature of said improvements being as follows: Surveying, prospecting, and an open cut uncovering a vein of coal, and that she had caused to be located and opened a mine of coal on said land, and whether or not she, the said Florence Garman, was then and there in the actual possession of the said mines, and made the entry for her own use and benefit, and not directly or indirectly for the use and benefit of any other party; and which said declaration then and there, as he, the said Charles E. Herr, then and there well knew, was a false and fraudulent declaration, and one containing false and fraudulent statements material to the matter aforesaid in this, that she, the said Florence Garman, and her grantor, when and where she so made, subscribed, and presented the said declaration as afore-
8 said, had not expended in developing coal mines on said tract of land in labor and improvements the sum of fifty dollars, or any other sum, and in this, that she, the said Florence Garman, had not caused to be located and opened a mine of coal on said land, and in this, that she, the said Florence Garman, was not then and there in the actual possession of the said mine, and in this, that she, the said Florence Garman, did not then and there make the said entry for her own use and benefit, but in truth and in fact was then and there making said entry for the use and benefit of other parties, to wit, Charles E. Herr, George C. Franklin, and other parties to the grand jurors unknown. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the land first above described in this count of this indictment was then and there coal land of the said United States, open to purchase and entry as coal land.

And the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Charles E. Herr, at the time and place and in man-

ner and form aforesaid, unlawfully, knowingly, and willfully did procure the making, subscribing, and presenting of a false and fraudulent declaration in the form of an affidavit at purchase pertaining to a matter within the jurisdiction of the said Secretary of the Interior, against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that one Charles E. Herr, late of Durango, said district, on the thirty-first day of January, in the year of our Lord nineteen hundred and six, at the said city of Durango, in the said district of Colorado, did unlawfully, knowingly, and wilfully, by solicitation and inducement, procure one Sarah Minnick to make and subscribe and present to the Secretary of the Interior of the said United States by and through the register and receiver of the United States at Durango, Colorado, and she, the said Sarah Minnick, did, in pursuance of such solicitation and inducement by and through her agent and attorney in fact, Charles E. Herr, thereupon on said thirty-first day of January, nineteen hundred and six, make and subscribe and present to the said Secretary of the Interior, by and through the said register and receiver of the said United States land office at Durango, Colorado, a certain false and fraudulent declaration in the form of an affidavit at purchase pertaining to a certain matter hereinafter described, which was then and there a matter within the jurisdiction of the said Secretary of the Interior; that is to say, a declaration in the form of a coal land affidavit at purchase of her, the said Sarah Minnick, partly written and partly printed, of the tenor which here follows:

COAL LAND AFFIDAVIT AT PURCHASE.

UNITED STATES LAND OFFICE,
Durango, Colorado.

I, Sarah Minnick, a widow, whose post-office address is No. in the city of Dayton, county of Montgomery, and State of Ohio, and whose actual residence is city of Dayton, State of Ohio, and claiming under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, and under coal land declaratory statement No. 757, filed in the land office aforesaid, on the eighth day of November, A. D. 1905, by me, by Charles E. Herr, attorney in fact, the preference right of purchase to lots five and ten of section 7, the NE. ¼ of NW. ¼, and W. ½ of NE. ¼ of section 18, in township 35 N. of range 10, W., of the N. M. P. M., subject to sale at the U. S. land office at Durango, Colorado, do solemnly swear that I am over twenty-one years of age, and a

native born citizen of the United States; that I have never had the right of purchase under the aforesaid provisions of law, either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I and my grantor have expended in developing coal mines on said tract, in labor and improvements, the sum of fifty ($50.00) dollars, the nature of said improvements being as follows: Surveying, prospecting, and uncovering a vein of coal by open cut; that I have caused to be located and opened a valuable mine of coal thereon; that I am
11 now in the actual possession of the said mine, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party and I do furthermore swear that I am not well and personally acquainted with the character of the said described land, and with each and every legal subdivision thereof, not having frequently passed over the same; that my knowledge of said lands is not such as to enable me to testify understandingly with regard thereto; that a nonmineral affidavit is attached hereto, sworn to by Charles E. Herr, my duly authorized agent; that said tract and each and every legal subdivision thereof is chiefly valuable for coal, and more valuable for coal mining than for agricultural purposes; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, or copper, and that there is not within the limits of said land to my knowledge any valuable deposit of gold, silver, copper, or mineral other than coal. So help me God.

SARAH MINNICK.

STATE OF OHIO,
County of Montgomery, ss:

I hereby certify that the foregoing application was subscribed and sworn to before me and in my presence by the above-named applicant (who is personally known to me) this 25th day of January, A. D. 1906, at my office at Dayton, Ohio.

My commission expires Aug. 30, 1908.

[SEAL.]

W. A. BUDROE,
Notary Public.

Which said declaration then and there contained, amongst other things, certain statements material to the said matter within
12 the jurisdiction of the said Secretary of the Interior, that is to say, that she, the said Sarah Minnick, was then and there claiming said lands above described under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, and under coal land declaratory statement number seven hundred and fifty-seven, filed in the land office at Durango aforesaid, on the eighth day of November, nineteen hundred and five, by her, the said Sarah Minnick, by and through Charles E. Herr, her attorney in fact, the preference right of purchase to the land first above described, that she, the said Sarah Minnick, never had the right of purchase under the aforesaid provi-

sions of law, either as an individual or as a member of an association, and that she had never held any other land under its provisions, and that she, the said Sarah Minnick, and her grantor, had expended in developing coal mines on said tract in labor and improvements the sum of fifty dollars, the nature of said improvements being as follows: Surveying, prospecting, and an open cut uncovering a vein of coal; that she had caused to be located and opened a mine of coal on said land; and that she, the said Sarah Minnick, was then and there in the actual possession of the said mines, and made the entry for her own use and benefit, and not directly or indi-
13 rectly for the use and benefit of any other party; the said statements in the said declaration then and there being material in the matter aforesaid in this, that it was necessary in order to the due administration of the said laws by them that they, the said Secretary of the Interior and the said register and receiver of said land office, should thereby be truly informed whether or not the said Sarah Minnick was then and there claiming the said land above described under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, and under coal land declaratory statement number seven hundred and fifty-seven, filed in the land office at Durango aforesaid on the eighth day of November nineteen hundred and five, by her, the said Sarah Minnick, by and through Charles E. Herr, her attorney in fact, the preference right of purchase to the lands first above described; whether or not she, the said Sarah Minnick, ever had the right of purchase under the aforesaid provisions of law, either as an individual or as a member of an association, and whether or not she had ever held any other land under its provision; whether or not she, the said Sarah Minnick, and her grantor had expended in developing coal mines on said tract in labor and improvements the
14 sum of fifty dollars, and whether or not the nature of said improvements were as follows: Surveying, prospecting, and an open cut uncovering a vein of coal, and whether or not she had caused to be located and opened a mine of coal on said land; and whether or not she, the said Sarah Minnick, was then and there in the actual possession of the said mines and made the said entry for her own use and benefit, and whether or not she made said entry, directly or indirectly, for the use and benefit of any other parties; and which said declaration then and there, as he, the said Charles E. Herr, then and there well knew, was a false and fraudulent declaration, and one containing false and fraudulent statements, material to the matter aforesaid in this, that she, the said Sarah Minnick, and her grantor, when and where she so made, subscribed, and presented the said declaration aforesaid, had not expended in developing coal mines on said tract of land, in labor and improvements, the sum of fifty dollars, or any other sum; and in this, that she, the said Sarah Minnick, had not caused to be located and opened a mine of coal on said land, and in this, that she, the said Sarah Minnick, was not then

and there in the actual possession of the said mine, and in this, that she, the said Sarah Minnick, did not then and there make the
15 said entry for her own use and benefit, but in truth and in fact was then and there making said entry for the use and benefit of other parties, to wit, Charles E. Herr, George C. Franklin, and other parties to the grand jurors unknown. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the land first above described in this count of this indictment was then and there coal land of the said United States, open to purchase and entry as coal land.

And the grand jurors aforesaid, upon their oaths aforesaid, do say that the Charles E. Herr, at the time and place and in manner and form aforesaid, unlawfully, knowingly, and wilfully did procure the making, subscribing, and presenting of a false and fraudulent declaration in the form of an affidavit at purchase pertaining to a matter within the jurisdiction of the said Secretary of the Interior, against the peace and dignity of the said United States, and contrary to the form and the statute of the same in such case made and provided.

EARL M. CRANSTON,
United States Attorney.

(Endorsed:) No. 2032. United States District Court, District of Colorado. The United States of America v. Charles E. Herr.
16 Indictment. For procuring the making and presentation of a false and fraudulent affidavit pertaining to a matter within the jurisdiction of the Secretary of the Interior. R. S. 4746 as amended. A true bill, E. D. Welker, foreman. Filed June 22, 1907. Charles W. Bishop, clerk.

17 In the District Court of the United States for the District of Colorado, sitting at Denver.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA
vs.
CHARLES E. HERR.
} No. 2032. Demurrer.

Now the said defendant, Charles E. Herr, in his own proper person, comes into court here, and, having heard the indictment read, says:

That the said indictment, and as well each and every count thereof, and the matters therein and in each and every count thereof contained, are, as therein alleged, and set forth, not sufficient in law to compel him, the said Charles E. Herr, to answer thereto, nor is he, the said defendant, bound by the law of the land to answer the said indictment, or any count thereof; and this the said defendant is ready to verify.

And the said defendant does hereby further demur to the said indictment, and to each and every count therein contained, and says that the said indictment, as well as each and every count thereof, is wholly insufficient in law for the following specially stated reasons, and each and every of them, to wit:

18 First. That the said indictment does not, nor does either or any count thereof, charge or set forth the commission of any crime or offense by defendant, known to or recognized or denounced by any statute, or statutes, or law of the United States.

Second. That it does not appear from said indictment, nor is it aptly, or at all, charged therein, that the alleged affidavit, declaration, or document in said indictment set out and described was made or prepared or caused to be made or prepared for presentation, or was presented or caused to be presented, to the Secretary of the Interior or any officer or agent or representative of the United States, in connection with or in relation to any pending application, matter, or proceeding then or at all presented or submitted to any such person for action or determination; nor does it appear from any matters in said indictment, or any count thereof, alleged that any application, matter, or proceeding was anywhere pending in connection with or in relation to which such affidavit, declaration, or document was used or intended to be used or presented; nor does it appear that there was any account, claim, demand, or proceeding against the United States or any of its officers, employees, agents, or representatives, or any application or proceeding to obtain any sum of money or any lands,

19 property, or thing of or from the United States or any of its officers, employees, agents, or representatives, or any pending matter of any nature within the jurisdiction of the Secretary of the Interior or any other officer, agent, employee, or representative of the United States in connection with which, or in relation to which, or in furtherance of which, such or any false, forged, untrue, or fraudulent affidavit, declaration, document, paper, or writing was made or presented or caused to be made or presented.

Third. That it is not sufficiently, or at all, charged in said indictment or in any count thereof that there was any proceeding or matter of any kind pending for payment, approval, adjudication, consideration, action, or determination of any kind in relation to or in connection with or in furtherance of which the alleged or any affidavit, document, declaration, paper, or writing was prepared, made, presented, or used, or caused to be prepared, made, presented, or used, or was intended to be presented or used.

Fourth. That it is not sufficiently, or at all, charged in said indictment, or any count thereof, that the alleged or any affidavit, declaration, document, paper, or writing was made or prepared or presented or used, or caused or procured to be made or presented or used, with intent to defraud the United States.

20 Fifth. That it does not appear from said indictment, or any count thereof, that the alleged or any affidavit, declaration, document, paper, or writing was made, or caused to be made or pre-

sented, or used, or caused to be presented or used, in or in connection with or in relation to any claim for the payment of money, or to obtain, or aid in obtaining, the approval or payment of any claim or demand upon or against the United States for the payment of money.

Sixth. That it is not sufficiently, or at all, charged in said indictment, or any count thereof, that said alleged or any false affidavit, declaration, instrument, document, paper, or writing was made, or caused to be made, or presented, or used, or caused to be presented or used, for the payment or approval, or to obtain or aid in obtaining the payment or approval, of any claim or demand upon or against the United States.

Seventh. That it is not sufficiently, or at all, charged in said indictment, or any account thereof, that the said alleged false, or any, affidavit, instrument, document, paper, declaration, or writing was made or presented or used, or caused or procured to be made, presented, or used, or was intended to be made, presented, or used, in or for the payment or approval, or to obtain or aid in obtaining the payment or approval, of any claims or demands upon or against the
21 United States, or to induce, procure, obtain, or aid in obtaining any action upon or consideration or determination of any account, claim, or demand, upon or against the United States, or any application, proceeding, or other matter affecting its property, rights, privileges, duties, or powers.

Eighth. That it is not sufficiently, or at all, charged in the said indictment, or any count thereof, that said alleged false or any affidavit, declaration, instrument, or writing, was made or used, or caused to be made or used in, or in support of, or in relation to or in connection with or furtherance of any false, fraudulent, or fictitious account, claim, demand, application, or proceeding.

Ninth. That it is not sufficiently, or at all, charged in said indictment, or any count thereof, that the alleged affidavit, declaration, instrument, paper, or writing, or any of them, in said indictment, or any count thereof, mentioned, was or were false or forged, but, on the contrary, it appears from the allegations of the said indictment, that the same was and were genuine instruments, alleged merely to have contained false matter or statements.

22 Tenth. That it is not sufficiently, or at all, charged in the said indictment, or any count thereof, that the alleged, false matter or statements in said alleged affidavits, or declarations, or any of them contained, or any part thereof, was or is material, pertinent, or necessary to any pending matter or is or was material for any purpose or in any matter or proceeding.

Eleventh. That it appears from said indictment, and from the allegations of each and every count thereof, that the alleged false and fraudulent matter in said affidavit or declaration, and each and every of them contained, and each and every part of such alleged false and fraudulent matter, was and is wholly immaterial.

Twelfth. That the alleged false and fraudulent matter and statements in the affidavit or declaration, and each of them, in said indict-

ment, and in each count thereof, set out, are and were not material nor as to material matters and the making or presentation thereof constituted no offense against the United States.

Thirteenth. That any and all matters in said affidavit, or any of them, in said indictment, or any count thereof, set out, which in said indictment, or any count thereof, are alleged to be false, fraud-
23 ulent, or untrue, are wholly immaterial as affecting any right to enter or purchase the lands in said indictment, or any count thereof, described.

Fourteenth. That it is not alleged in said indictment, or any count thereof, that the statements of said declaration, affidavit, or document, alleged to have been presented by defendant, that the declarant was over 21 years of age, a native born citizen of the United States, and that she had never had the right to purchase under the provisions of the coal land law, either as an individual or as a member of an association, and that she had never held any other lands, under the provisions of said law, or any of such statements, were false or untrue, and it does not appear from the said indictment, or any count thereof, of any allegation therein, that said declarant was not in each case fully authorized and empowered and qualified to purchase lands in said document described, or that there were in any case any other claimants therefor, or that any other statement, in said document contained, was material as affecting the right of said declarant or claimant to purchase said lands.

Fifteenth. That it appears from the said indictment, and from the allegations of each and every count thereof, that the party and each party making the several affidavits or declarations therein set
24 forth, were, under the facts and circumstances in said indictment, and each count thereof set forth, lawfully qualified and entitled to purchase and enter the several respective tracts of land in said several respective documents mentioned, under the laws of the United States, and that no such purchase or entry by or for or in the name of them, or either of them, did or does constitute any offense against the United States.

Sixteenth. That none of the alleged offenses in said indictment, or any count thereof, charged, relate to any pension, claim, or the payment thereof, or to bounty lands or to any matter recognized by section 4746 of the Revised Statutes of the United States, or within its provisions.

Seventeenth. That it does not appear that any of the alleged acts of defendant, constituting the supposed offense in said indictment, or any count thereof, charged, or any of such acts, were done in, or in connection with, or in relation to, or in furtherance of any matter within the jurisdiction of the Commissioner of Pension or of the Secretary of the Interior.

Eighteenth. That it is not sufficiently alleged in the said indictment, or in any count thereof, that the said so-called declarations in the form of affidavit at purchase, or any of them in said
25 indictment, or any count thereof mentioned, pertained to or was prepared, presented, or used in or in relation to any matter

then and there, or at all, within the jurisdiction of the Secretary of the Interior.

Nineteenth. That it appears from the allegations of the said indictment, and each and every count thereof, that none of the said alleged declarations in the form of an affidavit at purchase were made, presented, or used, or could have been made, presented, or used in or in relation to or connection with any matter then within the jurisdiction of the Secretary of the Interior, and that if made or used, or intended to be used, in any matter or proceeding whatever, such matter was before and within the then jurisdiction of other officers or persons than the Commissioner of Pensions or the Secretary of the Interior, and it does not appear from the allegations of the said indictment, or any count thereof, that such matter, if any matter was pending, was or could or did ever be or become within the jurisdiction of the Commissioner of Pensions or of the Secretary of the Interior.

Twentieth. That the said indictment charges two alleged offenses in each and every count thereof, and that in each and every count thereof there has been improperly joined the charge that de-
26 fendant procured the making of the alleged declarations in the form of affidavit at purchase, therein described, together with the charge or charges that he presented or procured the presentation thereof.

Twenty-first. That said indictment, and each and every count thereof, is ambiguous, unintelligible, and uncertain in this, that it is impossible to know or be informed thereby whether defendant is charged or intended to be charged with the making of the alleged declarations in the form of an affidavit at purchase, or with procuring it to be made by another, or with presenting or using the same, or with procuring it to be presented or used or with aiding in its presentation or use, and, if charged with procuring its presentation, it is not charged by or through whom he procured it to be presented or used.

Twenty-second. That the said indictment, and each count thereof, fails to inform the defendant of the nature and cause of the accusation against him with the certainty, definiteness, and particularity required by the sixth amendment to the Constitution of the United States, in this, to wit: That the said indictment and the several counts thereof do not, nor does either of them, inform the defendant as to the nature or identity of the matter or proceeding in or in relation to or connection with or in furtherance of which it is
27 charged or proposed to be shown the alleged declarations in the form of affidavit at purchase, or either of them, were made or presented; or whether any such matter or proceeding was or is pending, or where or before whom it was or is pending; or what account, claim, demand, or application was made or is being made; or by whom or in whose favor any such matter, account, claim, or proceeding was made or intended to be made; or what matter, property, right, privilege, power, duty, or thing was involved or affected

thereby; or how or in what manner said declaration, or either of them, or any matter or statement therein contained, was material; or how or in what manner any alleged false statement or matter in said declarations in the form of affidavit at purchase, or either of them, was material; or how or in what manner any such alleged false matter or statement could or did affect any right, power, duty, or privilege in the premises, or any action or determination had or sought to be had in any matter; or how or in what manner the United States was or could have been defrauded by any such false statement or matter; or by whom the alleged declarations in form of affidavit at purchase was presented; or whom the defendant procured to make such presentation; or whether defendant is to be charged with procuring the making of such declarations, or either of them, by another, or with the presentation thereof, or procuring such representation; or
28 whether the alleged offense, or either of them, was committed within the jurisdiction of this court; or where the alleged offense was committed; and, that there is no direct, positive, or certain averment in said indictment, or any count thereof, as to said several matters from which defendant is or can be informed in relation thereto so as to properly prepare and make his defense herein, or from or by which he is properly informed as to the nature and cause of the accusation against him.

Twenty-third. That the said indictment, and each and every count thereof, is further defective and insufficient in this, to wit:

That the general allegations therein and each count thereof contained, to the effect that the several declarations in the form of an affidavit at purchase were presented to the Secretary of the Interior by and through the register and receiver, and that they and each of them pertained to a matter within the jurisdiction of the Secretary of the Interior, and that said declarations, and each of them, contained statements material to said matter within the jurisdiction of the Secretary of the Interior, and that said statements were material; and that said declarations and each of them contained false and fraudulent statements which were material; and each and every
29 of such allegations are mere statements of legal conclusions and are not averments of any fact or facts, and are not supported or warranted by any fact or facts alleged in said indictment, or any count thereof; and that there is not in said indictment, or in any count thereof, any sufficient allegation or allegations by or from which defendant is informed as to how or in what manner such declarations, or either of them, were or were intended to be presented to the Secretary of the Interior, or what was the nature of any matter or matters in which such declarations, or either of them, were presented, or how or in what manner such matter came to be or was within the jurisdiction of the Secretary of the Interior, or what matter, if any, was pending, or whether any matter was pending, in or in relation to which it is proposed to show such declarations were presented, or what issues were involved in such matter, or how such declaration, or either of them, or any statement or statements, whether alleged to be false or

true, therein, or in either of them, contained was material or pertinent to any issue or question involved or presented.

Twenty-four. That said indictment, and each and every count thereof, fails to inform the defendant of the nature or cause of the accusation against him, with the certainty and particularity
30 required by the sixth amendment to the Constitution of the United States, in this, to wit: That it does not, nor does any count thereof, sufficiently aver or set forth the nature or character of the matter alleged, as a conclusion of law, to have been within the jurisdiction of the Secretary of the Interior, or identify any particular matter or proceeding, or the issues or questions involved therein or affected thereby, so that defendant may be properly advised as to the particular matter in or in relation to which it is proposed to show the alleged false or fraudulent declarations in the form of affidavit at purchase were made or presented.

Twenty-five. That in and by the said indictment it is sought to deprive this defendant of liberty and property, without due process of law, in violation of the provisions of the 14th amendment to the Constitution of the United States, in this, to wit: That this indictment is returned under and this prosecution is based upon the provisions of section 4746 of the Revised Statutes of the United States as amended, being section 33 of the act of March 3rd, 1873, entitled "An act to revise, consolidate, and amend the laws relating to pensions," as amended by the act of July 7th, 1898. And the said statute not being applicable or adapted to the matters or transactions
31 disclosed by said indictment and a prosecution thereunder not being appropriate to the case set up in said indictment or just to this defendant, for the reason that said statutes relate to and cover only claims for pensions and their payments or kindred matters, which are or may be within the jurisdiction of the Commissioner of Pensions or the Department having jurisdiction over such matters.

Whereas the matters and transactions constituting the alleged offense as disclosed by said indictment relate to public lands over which the General Land Office and the Commissioner of the General Land Office have jurisdiction and which are not within the jurisdiction of the Commissioner of Pensions or his Department and are not related to or connected with any claim for pensions or the payment thereof or any kindred or like matter.

And for other good and sufficient reasons appearing of record.

Wherefore, for want of a sufficient indictment in this behalf, the said defendant prays judgment, that by the court the said defendant may be dismissed and discharged from the said premises in the said indictment specified.

Durango, Colo.

RITTER & BUCHANAN,
Attorneys for Defendant.

32 (Endorsed:) No. 2032. U. S. District Court. United States v. Charles E. Herr. Demurrer to indictment. Filed Nov. 9, 1907. Charles W. Bishop, clerk. Ritter & Buchanan, attys.

Twenty-ninth day, November term, Monday, December 9th, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* CHARLES E. HERR.	2032. Indictment for making false proofs before land office.

At this day comes Frank Hall, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the defendant by Nathan C. Miller, esquire, his attorney, also comes. And the demurrer to the indictment herein coming on now to be heard is argued by counsel and by the court taken under advisement.

Forty-first day, November term, Monday, December 30th, A. D. 1907.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* CHARLES E. HERR.	2032. Indictment for making false proofs before land office.

33 At this day comes Ernest Knaebel, esquire, assistant to the Attorney-General, who prosecutes the pleas of the United States in this behalf, and the demurrer to the indictment herein having heretofore come on to be heard, and having been argued by Frank Hall, esquire, assistant to the Attorney-General, and by Nathan C. Miller, esquire, attorney for the defendant, and having been taken under advisement, and the court having considered the same and being now fully advised in the premises, it seemeth to the court now here that the indictment herein is not sufficient in law to be answered unto, and so the demurrer is hereby sustained.

To which order and ruling of the court the plaintiff excepts, and an exception is hereby allowed to it.

Forty-eighth day, November term, Wednesday, January 8th, A. D. 1908.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA *vs.* CHARLES E. HERR.	2032. Indictment for making false proofs before land office.

At this day comes Ernest Knaebel, esquire, special assistant to the Attorney-General, who prosecutes the pleas of the United
34 States in this behalf, and the defendant by Nathan C. Miller, esquire, his attorney, also comes. And the demurrer of the

defendant to the indictment having heretofore and on, to wit, the thirtieth day of December last, at this same term, been ordered sustained for the reasons and upon the grounds, and none other, set forth and explained in the opinions of the court filed respectively on that day in this case and in case number 2022 in this court between the United States of America and F. W. Keitel and others, in so far as the latter opinion expressly relates to the second count in the indictment in the cause last mentioned.

It is now considered, ordered, and adjudged by the court that, upon the same grounds and for the same reasons in the said opinions expressed, and none other, the defendant of and from the premises in this said indictment specified be discharged and go hence hereof without day.

It is further ordered by the court that if the United States shall sue out a writ of error to the Supreme Court of the United States from this order and judgment the defendant shall enter into a personal recognizance before an United States commissioner in the sum of one thousand dollars ($1,000) conditioned that he shall personally appear in this court on the first day of the next term thereof at Denver, and from day to day and from term to term thereafter, and answer
35 the indictment herein if the judgment herein shall be reversed by the said Supreme Court, and until such recognizance shall have been duly executed and filed with the clerk of this court the existing recognizance now on file in this case shall be and remain binding upon the defendant and his sureties.

To which order and judgment the plaintiff then and there at the time thereof excepted, and an exception was allowed to it.

35½ In the District Court of the United States within and for the District of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
CHARLES E. HERR, DEFENDANT. } No. 2032.

Bill of exceptions.

Be it remembered that on the 9th day of November, 1907, in this cause, the defendant filed his demurrer to the indictment, which demurrer is in words and figures set forth in the transcript of the record proper of this cause, at pages 17 to 32 of such transcript, as such transcript will be certified pursuant to the writ of error to be sued out by the United States to review the judgment and decision herein in the Supreme Court, and afterwards and on, to wit, the 9th day of December, 1907, the same being one of the regular jurid-

ical days of the November, 1907, term, of this court, before the court, the Hon. Robert E. Lewis, district judge, presiding, N. C. Miller, esquire, and B. W. Ritter, esquire, appearing as counsel for the defendants, and Frank Hall, esquire, special assistant to the Attorney-General, appearing as counsel for the United States, this cause came on to be heard upon the indictment and the demurrer of the defendant thereto and to each count thereof, and was argued by counsel.

And thereafter, on, to wit, the 30th day of December, 1907, of the same term, the court made its decision and order upon the
36 matters so heard and argued, sustaining the said demurrer as to the indictment and each count thereof, for the reasons and upon the grounds, and those only, which are set forth in a certain writen opinion of the court, then filed by the court, in this cause, and in so much of a certain other written opinion of the court then filed by it in cause number 2022 in this court, entitled The United States v. F. W. Keitel et al., as expressly relates to the second count of the indictment in the cause last mentioned; the court not deeming it necessary to pass upon or consider other objections urged to the indictment; which opinions are respectively in words and figures as follows, to wit:

37 In the District Court of the United States for the Distract of Colorado.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CHARLES E. HERR, DEFENDANT.	No. 2032. R. S. U. S., sec. 4746.

The indictment in this case, in its first count, charges that the defendant on January 31st, 1906, did unlawfully, knowingly, and wilfully, by solicitation and inducement, procure one Florence Garman to make and subscribe and present to the Secretary of the Interior of the United States, by and through the register and receiver of the United States land office at Durango, on said January 31st, through her agent, the defendant, a certain false and fraudulent declaration in the form of an affidavit at purchase, to wit, a declaration in the form of a coal land affidavit at purchase. The indictment then sets out the affidavit in hec verba. It is then charged that said declaration contained certain statements material to the said matter then and there within the jurisdiction of the Secretary which were false and fraudulent in the particulars, viz:

38 (1) That the said Florence Garman and her grantor had not expended in developing coal mines upon the land in question the sum of $50, or any sum; (2) that the said Florence Garman had not caused to be located and opened a mine of coal on said land; (3) that the said Florence Garman was not then and there in the actual possession of the said land; (4) that the said Florence Garman did not then and there make the said entry for her own use and benefit,

but for the use and benefit of the defendant and one Franklin and others to the grand jurors unknown.

The second count of the indictment is identical with the first except in that it charges that the affidavit was made by one Sarah Minnick.

The affidavits set out in the indictment were not required by statute but were required under rule 32 of the regulations of date of July 31st, 1882, made by the Commissioner of the Land Office and approved by the Secretary of the Interior.

It will be observed that the indictment does not negative the qualifications of the purchaser or entrywoman, as required by R. S. U. S., sec. 2347 (act of March 3, 1873), nor that the purchaser had theretofore exhausted her right as limited by said section. The purchases
here charged were evidently made under section 2348, which
39 gives a preference right of entry to those who have opened and improved coal lands upon the public domain and are in possession of the same, and the indictment does not negative the fact that the purchaser was in possession of and had opened and improved the lands at the time of her original application. The negation in that regard only goes to the time of purchase, which by section 2349 is extended for a period of fourteen months after the original application. The statute in question does not require an affidavit of the applicant at any time, though it may be conceded that one establishing the qualifications of the applicant at the time of application would be eminently proper on the part of the land officials. While the indictment charges that the affidavit in question was presented to the Secretary of the Interior, it was conceded by counsel for the Government in argument that it was not, in fact, presented to that official, but filed in the land office at Durango, where it yet remains.

To this indictment a demurrer was filed, and has been fully argued. In view of the concession made by counsel for the Government on the argument of the demurrer, the demurrer to each count is sustained for reasons given on consideration of the second count in indictment in case No. 2022, being United States of America v. F. W. Keitel et al., and heretofore filed with the clerk.

Dec. 30, 1907.

ROBT. E. LEWIS,
District Judge.

* * * * * * *

68 To which decision and order of the court so sustaining the said demurrer, for the reasons and upon the grounds in the said opinions so set forth, the United States, by its counsel, then and there duly excepted.

And thereafter, on the 8th day of January, 1908, of the same term, the court, pursuant to the aforesaid previous decision and order, and for the reasons and upon the grounds aforesaid in the said opinions set forth, made and entered its final order and judgment in this cause, sustaining the said demurrer and adjudging that the defendant of

and from the premises in the indictment specified be discharged and go hence without day.

To which order and judgment of the court, and each and every part thereof, and particularly to the parts thereof so, for the reasons and upon the grounds aforesaid, sustaining the said demurrer and adjudging that the defendant of and from the premises in the indictment specified be discharged and go hence without day, the United States, by its counsel, then and there duly excepted.

And forasmuch as the foregoing matters do not appear of record, the plaintiff tenders this its bill of exceptions, and prays that the same may be signed and duly authentic'ed and made a part of the record herein, which is accordingly done this 22nd day of January, 1908.

ROBT. E. LEWIS,
District Judge.

Service of the foregoing bill of exceptions was made upon us this day of January, 1908.

N. C. MILLER.
Attorneys for the Defendant in the Above-Entitled Cause.

O. K.
N. C. MILLER,
Atty. for Defendant.

69 (Endorsed:) No. 2032. United States District Court, District of Colorado. The United States of America, plaintiff, v. Charles E. Herr, defendant. Bill of exceptions. Filed Jan. 22, 1908. Charles W. Bishop, clerk.

70 In the District Court of the United States within and for the District of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
CHARLES E. HERR, DEFENDANT. } No. 2032.

Petition for writ of error.

And comes now the United States, plaintiff herein, and says that on the 30th day of December, 1907, this court made its decision holding insufficient and setting aside the indictment in this cause, and that thereafter, and on the 8th day of January, 1908, this court, pursuant to that decision, entered judgment herein in favor of the defendants and against this plaintiff, in which judgment and decision certain errors were committed to the prejudice of this plaintiff, and of such a character as to entitle this plaintiff, under the law, to review the said judgment and decision in the Supreme Court of

the United States by writ of error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

71 RALPH HARTZELL,
Ass't & Acting United States Attorney
for the District of Colorado,
ERNEST KNAEBEL,
Special Assistant to the Attorney-General,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Colorado, ss:

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

ROBT. E. LEWIS,
District Judge.

Dated Denver, Jan'y 27th, 1908.

(Endorsed:) No. 2032. United States District Court, District of Colorado. The United States of America, plaintiff, v. Charles E. Herr, defendant. Petition for writ of error. Filed Jan. 27, 1908. Charles W. Bishop, clerk.

72 In the District Court of the United States within and for the district of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
CHARLES E. HERR, DEFENDANT. } No. 2032.

Assignment of Errors.

Comes now the United States of America, plaintiff in the above-entitled cause, and files this assignment of errors to the judgment heretofore entered by the District Court for the district of Colorado in the above-entitled cause, to wit:

First. The District Court for the district of Colorado erred in sustaining the demurrer of the defendant to the indictment and in rendering judgment for the defendant.

Second. The said District Court erred in sustaining the said demurrer as to the first count of the indictment.

Third. The said District Court erred in sustaining the said demurrer as to the second count of the indictment.

Fourth. The said District Court erred in construing section 4746 of the Revised Statutes, as amended by the act of July 7, 1898
73 (30 Stat. L., p. 718), as applicable only to pension matters and not to matters touching the public lands within the jurisdiction of the Secretary of the Interior.

Fifth. The said District Court erred in holding that the coal entry proceedings mentioned in the indictment, and each count thereof, and pertaining to which the false and fraudulent declarations therein referred to, were procured to be made and presented to the Secretary of the Interior as in the indictment alleged, could not be matters "within the jurisdiction of the Secretary of the Interior," within the meaning of section 4746 of the Revised Statutes as the same stands amended by the act of July 7, 1898. (30 Stat. L., p. 718).

Sixth. The said District Court erred in construing section 4746 of the Revised Statutes, as amended by the act of July 7, 1898 (30 Stat. L., p. 718), where the same denounces as a crime the act of procuring the making or presentation of false and fraudulent affidavits and declarations pertaining to any matter within the jurisdiction of the Secretary of the Interior, as including only cases where such spurious affidavits and declarations are to be used in simulated compliance with some statute specifically requiring the making and filing of designated writings of that character, and not to cases where the requirement, so fraudulently to be met, is found in rules and regulations of the Land Department, made and adopted pursuant to statutory authority, and for the purpose of enabling that department to obtain proofs material and necessary for the proper performance of its legal duties.

Seventh. The said District Court erred in sustaining the said demurrers and in rendering judgment for the defendant upon
74 the basis, and because of the erroneous statutory constructions and interpretations indicated in the fourth, fifth, and sixth specifications of this assignment of errors.

Wherefore, the United States of America prays that the judgment of the District Court of the United States for the district of Colorado be reversed, and that the said District Court be directed to reinstate the said indictment and proceed with the trial of the cause.

RALPH HARTZELL,
Assistant and Acting U. S. Attorney
for the District of Colorado,

ERNEST KNAEBEL,
Special Assistant to the Attorney-General,
Attorneys for the United States.

(Endorsed:) No. 2032. In the U. S. District Court. The United States of America, plaintiff, vs. Charles E. Herr, defendant. Assign-

ment of errors. Filed January 27, 1908. Charles W. Bishop, clerk. Earl M. Cranston, United States attorney for the district of Colorado.

75 Fifty-seventh day, November term, Monday, January 27th, A. D. 1908.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the fifth day of November, A. D. 1907.

THE UNITED STATES OF AMERICA, *vs.* CHARLES E. HERR. } 2032. Indictment for making false proofs before land office.

Upon reading and filing the foregoing petition and the assignment of errors therein referred to, it is ordered that the petition be, and the same hereby is, allowed, and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district, under the seal of such Circuit Court, pursuant to section 1004 of the Revised Statutes.

76 In the District Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

UNITED STATES *versus* CHARLES E. HERR. } No. 2032.

The clerk will issue a complete transcript of the record in the above-entitled cause, said transcript to contain indictment, all demurrers, and all orders of court, together with the opinion of the court in this case and in case No. 2022.

EARL M. CRANSTON,
Attorney for U. S.

To CHARLES W. BISHOP, *Clerk.*
Denver, Colorado, Jan. 4, 1908.
(Endorsed:) No. 2032. United States District Court for the District of Colorado. U. S. versus Charles E. Herr. Præcipe for transcript of record. Filed Jan. 4, 1908. Charles W. Bishop, clerk. Earl M. Cranston, attorney for U. S.

77. UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judge of the District Court of the United States for the District of Colorado, greeting:

Because in the decision, record, and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court

before you, between The United States of America, plaintiff, and Charles E. Herr, defendant, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of January, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] CHARLES W. BISHOP,
Clerk of the Circuit Court of the United States for the District of Colorado.

Allowed by
ROBT. E. LEWIS,
Judge of the United States District Court for the District of Colorado.

78 *Return.*

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the honorable the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said United States District Court for the district of Colorado, at Denver, in said district, this first day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

79 (Indorsed:) No. 2032. United States District Court, district of Colorado. The United States of America, plaintiff, *v.* Charles E. Herr, defendant. Writ of error. Filed in United States District Court, district of Colorado, January 27, 1908. Charles W. Bishop, clerk.

80 UNITED STATES OF AMERICA, *ss.*

TO CHARLES E. HERR, *Greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty

days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the district of Colorado, sitting at Denver, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert E. Lewis, judge of the District Court of the United States for the district of Colorado, this 27th day of January, in the year of our Lord one thousand nine hundred and eight.

ROBT. E. LEWIS,
Judge of the District Court of the United States for the district of Colorado.

I hereby acknowledge service of the foregoing citation, this 28th day of January, 1908.

N. C. MILLER,
Attorney for Defendant.

80½ (Indorsed:) 2032. U. S. District Court, district of Colorado. The United States of America *vs.* Charles E. Herr. Citation. Filed Jan. 28, 1908. Charles W. Bishop, clerk.

80½ UNITED STATES OF AMERICA, *ss.*

To CHARLES E. HERR, *Greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the district of Colorado, sitting at Denver, wherein the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert E. Lewis, judge of the District Court of the United States for the district of Colorado, this 27th day of January, in the year of our Lord one thousand nine hundred and eight.

(Signed.) ROBT. E. LEWIS,
Judge of the District Court of the United States for the district of Colorado.

We hereby acknowledge service of the foregoing citation, this 30th day of January, 1908.

RITTER & BUCHANAN,
Attorneys for the Defendant.

(Indorsed:) No. 2032. U. S. District Court, district of Colorado. United States *v.* Charles E. Herr. Copy of citation. Filed Feb. 4, 1908. Charles W. Bishop, Clerk.

81 UNITED STATES OF AMERICA,
District of Colorado, ss.

I, Charles W. Bishop, clerk of the District Court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to seventy-six (76), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings and other matters set forth in the præcipe filed herein, together with a true copy of such præcipe and bill of exceptions, petition for writ of error, and assignments of error, and judgment, and all other matters (exclusive of briefs, bench warrants, and recognizances) heretofore filed or entered of record in said court, and in a certain case lately in said court pending wherein the United States of America was plaintiff and Charles E. Herr was defendant, as fully and completely as the same still remain on file and of record in my office at Denver.

And I further certify that I have annexed to and transmit herewith a copy of all opinions heretofore handed down and filed in the above-entitled case and in case No. 2022, wherein the United States of America was plaintiff and F. W. Keitel and others were defendants.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the city and county of Denver in said district, this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

* * * * * * *

114 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from eighty-two (82) to one hundred fourteen (114) to be a true, perfect, and complete transcript and copy of all opinions heretofore handed down and filed in said court and in two certain cases lately in said court pending wherein the United States of America was plaintiff and Charles E. Herr was defendant; and the United States of America was plaintiff and F. W. Keitel and others were defendants, respectively, as fully and completely as the same still remain on file in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court at the city and county of Denver in said district, this third day of February, A. D. 1908.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

115 In the Supreme Court of the United States, October term, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v. No. 631.
CHARLES E. HERR.

Stipulation.

It is hereby stipulated by counsel for the parties to the above-entitled cause that in the printing of the transcript of the record herein the clerk of the Supreme Court shall omit pages 82 to 85, inclusive, being a repetition of the opinion of the court herein, which appears elsewhere in the transcript of the record, to wit, at pages 37 to 39, inclusive; also omit pages 40 to 67, inclusive, and pages 86 to 114, inclusive, being the opinion of the court in the case of The United States v. F. W. Keitel et al., which is printed in the transcript of the record in that case.

H. M. HOYT,
Solicitor-General.

N. C. MILLER,
Counsel for Defendant in Error.

February, 1908.

116 (Indorsed:) File No. 21034. Supreme Court U. S., October term, 1907. Term No. 631. The United States, p. e., vs. Charles E. Herr. Stipulation to omit part of record in printing. Filed Feb. 29, 1908.

(Indorsement on cover:) File No. 21034. Colorado D. C. U. S. Term No. 631. The United States, plaintiff in error, vs. Charles E. Herr. Filed February 19th, 1908. File No. 21034.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR, *v.* F. W. KEITEL, ARIE KEITEL, FRANK P. Fay, et al.	No. 625.

BRIEF OF THE UNITED STATES IN OPPOSITION TO MOTION OF CERTAIN OF THE DEFENDANTS TO DISMISS WRIT OF ERROR.

This case has been advanced by the court and set down for hearing on the merits on October 13 next with other cases similar thereto.

The reasons for the motion to dismiss are so broad that it would require a consideration of the whole case to pass upon the motion.

For both of these reasons it is submitted the consideration of the motion should be postponed until the hearing on the merits.

This case comes before the court by writ of error directed to the District Court of the United States for the District of Colorado, under authority of the act of March 2, 1907 (34 Stat., 1246, c. 2564), which authorizes a writ of error, on behalf of the United States, from District or Circuit Courts directly to this court " from a decision or judgment quashing,

setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

This statute has twice been before this court and its validity sustained.

> *Taylor* v. *United States*, 207 U. S., 120.
> *United States* v. *Bitty*, decided February 24, 1908.

The defendants other than the defendant Louis M. Rumsey have moved to dismiss the writ of error, claiming that the judgment and decision below were not based upon a construction of the statutes upon which the indictment was founded, so that it becomes material to consider first the issues of law presented by that pleading and the several motions to quash and determined by the trial court, and the grounds of determination expressed in its written opinion. Success of the motion depends upon its being well directed to both counts of the indictment.

The indictment appears in the printed transcript, beginning at page 1, and the motions to quash are there found, beginning at page 47.

The conspiracy charged in the first count (under Rev. Stat., sec. 5440), though shown to have been a unity—one agreement—and therefore properly chargeable in one count as it was, without dissection (*Dealy* v. *United States*, 152 U. S., 539), was of such a character as to involve two species of fraud upon the United States, both of which are

properly exhibited in the pleading: First, fraudulent acquisition of its coal land, contrary to the coal-land law, by false representations and deceitful appearances, through the medium of coal-land entries to be made by divers entrymen hired by the defendants to enter the lands and deed them to the defendants and a corporation (*United States* v. *Trinidad Coal Company*, 137 U. S., 161); and, second, fraud upon the administrative rights of the Government through deception of its officials by false affidavits, representations, etc. (*Hyde* v. *Shine*, 199 U. S., 62, 82; *United States* v. *Stone*, 135 Fed., 392; *Curley* v. *U. S.* (C. C. A.), 130 Fed., 1).

The second count was designed primarily to charge and emphasize that feature of the defendants' agreement which presents a violation of the clause in section 5440 of the Revised Statutes denouncing conspiracies to commit substantive penal offenses against the United States, and so alleges affirmatively that the conspiracy contemplated the making and presentation of false and fraudulent declarations, affidavits, and other writings pertaining to matters within the jurisdiction of the Secretary of the Interior (coal-land entries) in violation of section 4746 of the Revised Statutes, as amended (U. S. Comp. Stat., vol. 3, p. 3279), which is as follows:

> That every person who knowingly or willfully makes or aids, or assists in the making, or in any wise procures the making or presentation of any false or fraudulent affidavit,

declaration, certificate, voucher, or paper or writing purporting to be such, concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or of the Secretary of the Interior, or who knowingly or willfully makes or causes to be made, or aids or assists in the making, or presents or causes to be presented at any pension agency any power of attorney or other paper required as a voucher in drawing a pension, which paper bears a date subsequent to that upon which it was actually signed or acknowledged by the pensioner, and every person before whom any declaration, affidavit, voucher, or other paper or writing to be used in aid of the prosecution of any claim for pension or bounty land or payment thereof purports to have been executed who shall knowingly certify that the declarant, affiant, or witness named in such declaration, affidavit, voucher, or other paper or writing personally appeared before him and was sworn thereto, or acknowledged the execution thereof, when, in fact, such declarant, affiant, or witness did not personally appear before him or was not sworn thereto, or did not acknowledge the execution thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term of not more than five years.

Thus the second count may be justly said to be "founded" upon both of the penal statutes above

mentioned, and this is admitted in the opposing brief. But in addition it is to be noted that the allegations of the second count are also (unavoidably) sufficient to charge the conspiracy in the same aspects in which it appears in the first count (see opinion R., 92), so that its rejection by the court below resulted from that court's idea of the meaning and scope of section 5440, as well as its view of the applications of the other enactment.

In the motions to quash a variety of attacks was made upon the indictment, both as to substance and form; but, as will be seen, the decision went entirely upon the supposed inapplicability of the penal provisions above referred to.

The opinion of the district judge, announcing his reasons for quashing the indictment, is found in the bill of exceptions at pages 87 *et seq.* of the transcript. That the grounds upon which the indictment was set aside were those, and only those, which are set forth in this opinion is certain. (See record, 85, 87, 100.)

Passing the introductory pages of the opinion, in which the trial court expresses its view of the meaning of the indictment, we proceed to digest, briefly, with comment, what the court had to say upon the legal propositions of the case, beginning at page 93 of the printed transcript.

After observing that section 5440, as well as the coal-land law, will require consideration, the court holds, in passing upon the first count, that the allegations charging " the making of false, etc., pow-

ers of attorney, nonmineral affidavits and affidavits at purchase, and other representations and statements made to the register and receiver must be taken as charging a violation of the rules and regulations of the Land Office Department and the practice of the local land offices," and thereupon proceeds to " put out of view these rules and regulations " upon the ground that " they can not be made the basis of a crime." Inasmuch as the opinion nowhere denies that these rules and regulations were legally adopted and operative under the authority of the coal-land law (Rev. Stat., sec. 2351), but assumes that they were, we have here, at the very beginning, a vital construction of section 5440 of the Revised Statutes, to wit, that it does not apply to or include conspiracies to defraud the United States of its right to pure and intelligent administration of its laws, uncorrupted and undisturbed through forgery, false swearing, false representations and deceit practiced upon its officials, for the purpose of inducing them to act, innocently, in such ways as to defeat the objects of congressional legislation. And yet this court has said:

> The law punishes the false practices by which the lands were obtained, and the question whether the Government stands in the position of a *bona fide* purchaser with respect to the school lands is not one which can be litigated in a criminal prosecution for a violation of law. Even if the United States were in a position to claim the rights of a

bona fide purchaser to the State lands, the methods by which these lands were acquired from the States, and the lands in exchange therefor procured from the United States, would be none the less fraud, of which the latter might take advantage in a criminal prosecution.

Hyde v. Shine, 199 U. S., 62, 82.

See also *Curley* v. *United States* (C. C. A.) 130 Fed., 1.

Had the court below here adopted the construction contended for by the Government instead of the construction which it actually did adopt, the first count would have remained standing, in spite of what was subsequently held respecting the inapplicability, generally speaking, of section 5440 to conspiracies to defraud the United States of property by what, to the mind of the court, was a fraud only in an equitable sense; for it was not, and could not be, denied that the indictment alleged a scheme to obtain the lands in violation of the coal-land law (*United States* v. *Trinidad Coal Company*, 137 U. S., 161, and sufficiently alleged that the end was to be gained through false practices perpetrated upon the Land Department.

The next proposition of the lower court, and the final one, so far as the first count is concerned, is that the statute (sec. 5440) does not reach conspiracies to obtain coal lands for a corporation (in excess of what the corporation could directly acquire) through entrymen hired for the purpose and employing the corporation's moneys to pay the

Government for the land; because (the court holds) no common law fraud would there be involved, and the statute deals only with such frauds as were cognizable at common law. We quote from the opinion (R., 94):

> The only inquiry now is, whether we can find in what is left [after eliminating the rules and regulations] a crime under the second clause of sec. 5440, to wit, a conspiracy to defraud. The words of that clause of the section *do not specifically spell out* the offense. We look to the common law to find what they mean. In *Pettibone* v. *United States,* 148 U. S., 197, it is said: "The courts of the United States resort to the common law for the definition of terms by which offenses are designated." Certainly the term defraud as here used can not be accepted in its broadest sense. If so, it would cover constructive fraud, known only in equity; and thus until the chancellor decrees on given facts, no man knoweth what offenses he hath committed. That sequence impresses me as a legal perversion.
>
> Thus it seems that the case of the *Trinidad Coal & Coke Company* in 137 U. S., 161, so much relied on by the prosecution, can not be carried over into the domain of criminal jurisprudence, to be used here for the purpose of defining that term. It would therefore appear that the broadest stretch to which we can carry the term is to take it in its criminal aspect as known, if so known, to the common law.

The remainder of this branch of the opinion is devoted to a discussion of the doctrine of *strict construction* as applied to penal acts, and of the scope of conspiracy at common law, principally as defined by Wharton. The court appears to favor a view which would limit the operation of the statute to conspiracies involving means or ends independently criminal in themselves, or at least the doing of acts expressly and specifically prohibited by statute in every case (R., 90).

Nowhere do we find anything to justify the assertions in opposing counsel's brief that the decision turned upon questions of pleading, i. e., defects or omissions in the indictment; on the contrary, the reasoning assumes that the facts and all the facts are properly alleged, but, purely by construction of the statute, arrives at the conclusion that the facts are not and could not be such as to make the crime possible.

As to the second count the court first reaches the conclusion that the second statute (Rev. Stat., 4746 as amended) should be construed as relating wholly to pension matters (R., 97, 98); but, announcing that it waives its view upon that point in deference to other decisions, proceeds to construe the phrase "pertaining to any other matter within the jurisdiction of the Secretary of the Interior." Upon this the court says (R., 99):

> What is meant by jurisdiction as here used? Its prime conception is one of power. When used in a political sense, it means gov-

> ernmental authority; such as when we say, the Federal Government has jurisdiction over navigable waters and interstate commerce, such as when we say, a State has jurisdiction over affairs purely local. The section does not use the phrase " within the jurisdiction of the Secretary of the Interior " in that sense. That would smack too much of that imperialism, when the spirit of the Cæsars brooded over a vast empire, from whose capital city an impending hand reached out to its remotest confines. The word jurisdiction must be here used in its legal sense, meaning authority to hear and determine a cause. * * * To hold that the Secretary had jurisdiction of the matters charged in the indictment would be to liken jurisdiction in its legal sense to jurisdiction in its political sense which can not be done under this statute. I think it clearly appears that the matters charged in the indictment were not within the jurisdiction of the Secretary as contemplated in section 4746.

Then, as a third ground, and " aside from this and waiving all that has been said " (R., 99), the court holds the count insufficient upon the same ground first taken with respect to the first count, viz., that, since the affidavits and other writings referred to in the second count were of the character required by regulations, but not directly by statute, no crime could be based upon the making or filing of them. In other words, that section

4746 in its mention of false or fraudulent affidavits, etc., refers only to documents required to be filed, or otherwise provided for, *in specie,* by direct act of Congress. And, after quotations, the opinion concludes:

> For these reasons the motion to quash the second count is also sustained (R., 100).

It is submitted that the reasons upon which the indictment was quashed were the reasons discussed and favorably considered by the court, and that the mere statement that one conclusion is waived, in passing from it to another, imports a form of argumentative transition, rather than a rejection of the first conclusion as immaterial or without influence upon the result. But, however this may be, a perusal of the opinion leaves no doubt, first, that it was by construction of section 5440—an exceedingly strict construction, narrowing its scope far within what was earnestly attributed to it by the Government, that the first count was held bad; second, that it was by the same construction of that statute, and by construction of section 4746, that the second count met the same fate; and third, that there is no other basis for the court's action even hinted at in the opinion. From what has been said it follows that if the court's view of the bearing of section 5440 had been contrary to what it was, as to either of the aspects, of the case presented by the indictment (fraud in respect of property, and fraud upon governmental administration) the first count, and

the second count as well, would have been sustained under the first clause of that section, as charging a conspiracy to defraud; and that, even holding as it did as to the limitations of section 5440, the court could not have quashed the second count without construing section 4746 in some if not all of the ways in which it did in fact construe it.

The propositions which appear to be advanced in the brief of the moving parties as affording ground for dismissal of this case appear to be, first, that the trial court, though it did "interpret," did not "construe," section 5440; second, that, while it did "construe" section 4746, in connection with the second count, this was done out of pure exuberance of learning, and played no part in the quashing of that count; third, that the decision upon the first count was based on an insufficiency of the pleading, and that on the second count upon some ground other than construction, and fourth, that, under the appellate statute, this court has no jurisdiction in a case where the ruling below was founded in part upon statutory construction, and in part upon other reasons.

The distinction between the terms "interpret" and "construe" sought to be availed of, seems to be traceable to the theorizing of Doctor Lieber, in his work on Legal and Political Hermeneutics. While occasionally referred to, and approved, as drawing a proper line in abstract jurisprudence, no case has been cited by counsel, and it is highly

improbable that any could be found, where it was given a serious practical application in our law. On the other hand the content of the term "construction," when concerned practically in legislation and judicial decisions, seems always to include the content of the term "interpretation."

Judge Cooley in his work on Constitutional Limitations, says (6th Ed., p. 51):

> Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey. Construction, on the other hand, is the drawing of conclusions, respecting subjects that lie beyond the *direct expressions* of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter of the text. Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to when, in comparing two different writings of the same individual, or two different enactments of the same legislative body, there is found contradiction where there was evidently no intention of such contradiction one of another, or where it happens that part of a writing or declaration contradicts the rest. When this is the case, and the nature of the document or declaration, or whatever else it may be, is such

> as not to allow us to consider the whole as being invalidated by a partial or other contradiction, then resort must be had to construction; so, too, if required to act in cases which have not been foreseen by the framers of those rules, by which we are nevertheless obliged, for some binding reason, faithfully to regulate as well as we can our action respecting the unforeseen case. (Citing Lieber's work.)
>
> In common use, however, the word *construction* is generally employed in the law in a sense embracing all that is properly covered by both, when each is used in a sense strictly and technically correct; and we shall so employ it in the present chapter.

In a note, the author quotes the following definitions from Bouvier's Law Dictionary:

> *Interpretation,* the discovery and representation of the true meaning of any signs used to convey ideas.
>
> *Construction,* in practice, determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement.

Another learned writer, while adverting to the distinction made by Dr. Lieber, remarks that the two terms " are used interchangeably by writers upon the law." (2 Parsons on Contracts, 9th Ed., p. 647, note (a).)

The following definition of the term " construction " as given in Webster's Interna'l Dictionary

was quoted with approval in *Johnson* v. *Ins. Co.*, 105 Ia., 273, 277:

> Construction is "the method of constructing, interpreting, or explaining a declaration or fact; an attributed sense or meaning; understanding; explanation; interpretations; sense." "Strictly, the term signifies determining the meaning and proper effect of language by a consideration of the subject-matter and attendant circumstances in connection with the words employed."

In the case of *O'Donnell* v. *Glenn*, 9 Mont., 452, 467; 8 L. R. A., 629, 633, the court said:

> To construe or interpret a statute is to read it for the purpose of ascertaining its meaning and effect.

And in *Stratton* v. *Stratton*, 68 N. H., 582, 585:

> The "construction" of the will is the ascertainment of the testator's express intention—what he meant by what he said.

Black, in his Construction and Interpretation of Laws, p. 1, says:

> Construction, as applied to written law, is the art or process of discovering and expounding the meaning and intention of the authors of the law with respect to its application to a given case, where that intention is rendered doubtful either by reason of apparently conflicting provisions or directions, or by reason of the fact that the given case is not explicitly provided for in the law.

Quoted approvingly in *Deane* v. *State*, 159 Ind., 313, 316. (Cited in opposing brief.)

In *Terre Haute, &c., R. Co.* v. *Erdel*, 158 Ind., 344, where the appellate jurisdiction depended upon a statute allowing appeals in cases wherein there was in question "the proper construction of a statute," the court said (p. 347):

> The phrase "construction of a statute," as used in the new act, means to interpret, to elucidate, to define and declare the meaning of that which is obscure and uncertain, and can have no application to a statute in which there is nothing doubtful or ambiguous in its terms.

That case, like the case in 159 Indiana, above cited, raised no question of the meaning of the statute, and, of course, the concluding clause of this quotation is to be viewed with that fact in mind; for while in legal principle construction of a plain statute is unnecessary and erroneous, it by no means follows that such a statute may not be misapplied, and construed without necessity or legal propriety. We might agree with opposing counsel, for instance, that section 5440 is too plain in its meaning to admit properly of construction, and yet the court below has construed it and construed it so narrowly as in large measure to defeat the purposes and objects of Congress in enacting it—as we believe and hope to establish before this court at the proper time.

Surely, if the case permits any serious consideration of the academic distinction between construc-

tion and interpretation suggested by defendants' counsel, the suggestion defeats itself, for the statute (sec. 5440) includes all conspiracies to defraud the United States " in any manner or for any purpose," and it was only by a process of construction (in the limited Lieberian sense) that the trial court was able to satisfy itself that the generality of this inclusive language should be restrained in such manner as to exclude the species of fraud revealed by the indictment.

In Bouvier's Law Dictionary (Rawles Ed.), under " construction," it is said:

> Construction and interpretation are generally used by writers on legal subjects, and by the courts, as synonymous, sometimes one term being employed and sometimes the other. Lieber, in his Legal and Political Hermeneutics, distinguishes between the two, considering the province of interpretation as *limited to the written* text, while construction goes beyond, and includes cases where texts interpreted and to be construed are to be reconciled with rules of law or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument or determine its application to cases unprovided for.

It seems idle to pursue the argument here further, first, because the word " construction " is to be given its common, practical meaning, in accordance with a general principle of statutory construction; second, because the penal acts were

"construed," even in the stricter sense, by the court below; and third, because all question is foreclosed by the action of this court in the recent case of *United States* v. *Bitty, supra,* presenting a narrow construction of a penal statute, by a district court in form precisely analogous to the case at bar.

The assertions of defendants' counsel that questions of pleading and other questions, independent of those raised upon the statutes, formed in whole or in part the basis of the trial court's decision, are flatly contradicted by the opinion and need not be otherwise answered. Hence the attempt to restrain this court's jurisdiction to cases and questions resting exclusively upon construction of statutes is premature, as it is also out of accord with decisions heretofore rendered.

Williamson v. *United States,* decided January 6, 1908.

Burton v. *United States,* 196 U. S., 283, 295.

Field v. *Barber Asphalt Co.,* 194 U. S., 618, 620.

Penn Mutual Life Ins. Co. v. *Austin,* 168 U. S., 685, 695.

Holder v. *Aultman,* 169 U. S., 81, 88.

Scott v. *Donald,* 165 U. S., 58, 71.

Chappell v. *United States,* 160 U. S., 499, 509.

Horner v. *United States,* 143 U. S., 570, 576.

The many authorities collected in the opposing brief, involving the limited jurisdiction of this

court over decisions by State courts, it is unnecessary to review. Their citation, as well as the apparent position of counsel, which denies that there was construction below, or that there is jurisdiction here, because the lower court read the statutes (as counsel avers) correctly, suggests the aptness of the following quotation from an opinion of this court:

> The argument, then, in effect, is that the right to a direct appeal to this court does not exist when it is claimed that a State law violates the Constitution of the United States, unless the claim be well founded. But it can not be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case.
>
> The authorities referred to as supporting the position indicate that the argument is the result of a confusion of thought, and that it arises from confounding the power of this court to review on a writ of error the action of a State court with the power exercised by this court, under the act of 1891, to review by direct the final action of the circuit court where, on the face of the record, it appears that the claim was made that the statute of a State contravened the Constitution of the United States. These classes of jurisdiction are distinct in their nature and are embraced in different statutory provisions. Having jurisdiction of the case there exists a power to consider every question arising on the record.
>
> *Penn Mutual Life Ins. Co.* v. *Austin,* 168 U. S., 685, 695.

By the express language of the act of 1907, the writ of error goes to the judgment as an entirety.

It is submitted that the motion should be denied.

HENRY M. HOYT,
Solicitor-General.

ERNEST KNAEBEL,
Special Assistant
to the Attorney-General.

O

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1907.

THE UNITED STATES OF AMERICA, *Plaintiff in Error,* vs. F. W. KEITEL, ARIE KEITEL, FRANK P. FAY, LOUIS M. RUMSEY, WILLIAM BAER, WALTER S. PRICE, CHARLES F. W. HABERBECK, GUS HABERBECK, MAGDALENA HABERBECK, CHARLES H. DODGE AND ANNA DODGE, *Defendants in Error.*	No. 625.

MOTION.

Come now, F. W. Keitel, Arie Keitel, Frank P. Fay, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck and Gus Haberbeck, nine of the defendants in error, by their counsel, appearing in that behalf, and move the Court to dismiss the

writ of error issued in the above entitled cause, for want of jurisdiction, because it appears from the record herein and from the decision of the Court below, that the said decision was not based upon the construction of a Federal statute as is required by the Act of March 2, 1907, "An Act providing for writs of error in certain instances in criminal cases," in this, that other questions, not involving the construction of a Federal statute, were also decided by the Court below against the plaintiff in error, and the decision of the latter questions is sufficient to sustain the judgment rendered herein.

EDWIN H. PARK,

Counsel for F. W. Keitel, Arie Keitel, Frank P. Fay, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck and Gus Haberbeck, Defendants in Error, for the purposes of this Motion.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1907.

No. 625.

To the Hon. Charles J. Bonaparte, Attorney General, and H. M. Hoyt, Solicitor General, of the United States:

Please take notice, that on Monday, the 6th day of April, A. D. 1908, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of said Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with said motion in support thereof.

EDWIN H. PARK,

Counsel for F. W. Keitel, Arie Keitel, Frank P. Fay, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck and Gus Haberbeck, Defendants in Error, for the purpose of the Motion.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, A. D., 1907.

UNITED STATES OF AMERICA, *Plaintiff in Error.* vs. F. W. KEITEL, ET AL., *Defendants in Error.*	No. 625.

BRIEF OF ARGUMENT IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

The defendants in error were indicted June 11, 1907, on two counts, charged with violating Section 5440 of the Revised Statutes of the United States. The first count charges generally, among other things, a conspiracy to defraud the United States out of the title of certain coal lands

in the county of Routt, Colorado, said lands being a part of the public domain—by inducing persons to make entries in their own name, which entries were to inure to the use and benefit of a corporation organized and officered by certain of the defendants, the corporation thereby acquiring through subsequent mesne conveyances, more coal lands than could be entered directly. The second count charges defendants with a violation of the first clause of Section 5440, by conspiring to violate Section 4746 R. S. U. S. The overt acts charged the filing in the land office at Glenwood Springs, Colorado, of certain alleged affidavits which are said to have been false and fictitious.

Motions to quash the indictment and both counts thereof were filed by the several defendants, assigning among other reasons for the quashing of the indictment, the following, to wit:

> "That neither of said counts charge the defendant with any crime against or under the laws of the United States." (Record P. [illegible])

The motions were sustained and the indictment quashed. Thereupon the United States sued out this writ of error and brings the case here.

In Giles vs. Teasley, 193 U. S., 146, 160, it is said:

> "In every case which comes to this Court on writ of error or appeal, the question of jurisdiction must be first answered, whether propounded by counsel or not."

This writ of error is sued out by the United States upon the authority of the Act of Congress of March 2, 1907, which provides as follows:

> "That a writ of error may be taken by and on behalf of the United States from the District or

> Circuit Courts direct to the Supreme Court of the United States from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

We move to dismiss this writ of error for want of jurisdiction, because it appears from the opinion filed by the Court below (Record, p. 93) that the decision of the Court as to the first count in the indictment was not based upon a construction of the statute, and that the decision of the Court as to the second count was based upon other grounds decided adversely to the United States, which grounds are sufficient to sustain the decision and to quash the indictment.

The Court below, held under the first count, that the rules and regulations of the land office could not be made the basis of a criminal prosecution; the Court then uses this language:

> "The only inquiry now is, whether we can find, in what is left, a crime under the second clause of Section 5440." P94 Record

Speaking of the entrymen, as described in the indictment, the Court, in its opinion, said:

> "The entrymen were qualified as such; they obtained no more land than the acreage limited in the act and they paid the price fixed by Congress. The only offending charge against them is, that by their procurement, the entrymen acted for the corporation. The act (Coal Land Law) does not denounce what they did as criminal nor does it place a prohibition against their conduct

so that we could say their acts were therefore unlawful." P95 Record

The Court then proceeds to discuss the statute in the light of public policy and rules of construction applicable to penal laws, concluding that if the acts complained of did not come within the letter of the law, the indictment was insufficient, and upon the first count concludes:

> "I am clearly of the opinion that the first count does not state an offense, and the motion to quash is therefore sustained." P97 Record

Under the second count in the indictment, in deciding its sufficiency, the Court construes Section 4746 as being limited to pension matters, but the decision is not based upon this construction, for the Court says:

> "But aside from this and waiving all that has been said, it appears from the indictment that the entry of coal land complained of in the indictment, was made under Section 1 of the Act of March 3, 1873. That Act does not require of the entrymen any of the affidavits, certificates, papers, and writings complained of in the second count. These papers must therefore have been required, if required at all, by the rules and regulations of the Land Office. The Act may be said to require in all propriety a written application by the entryman, showing that he is qualified as such and has not theretofore exercised his right; but these facts are not negatived. So we view the matters complained of as papers and writings required by the rules and regulations." P99 Record

After quoting from the case of United States vs. Eaton 144 U. S., 677, the Court further says:

> "It seems to me that to hold that the second count charges an offense, would be going in direct

conflict with what is said in the Eaton case. For these reasons the motion to quash the second count is also sustained." Pico Record

We submit that under the first count, construction of Section 5440 is not involved; the decision of the Court is based directly upon the sufficiency of the pleading and not upon any construction of the statute, such as to enable the United States, under the Act of March 2, 1907, to sue out a writ of error or to give this Court jurisdiction of the case. Under the second count, the Court does construe the statute, but brushes all of what he has said relative to the statute, aside, and bases his decision flatly upon other grounds. For these reasons, we contend that this Court has not jurisdiction to entertain this writ of error.

We do not mean to say that at the hearing in the Court below we did not seek a construction of Section 5440, with respect to the word "defraud," nor that we did not there contend, that so far as that section applied to the indictment, it was invalid; but we here contend that the Court, in sustaining the motion to quash, did not pass upon any of the contentions which we there made with respect to the construction or validity of the statute.

The Judge's opinion gives to the word "defraud" its common law meaning in its application to the indictment. Also, the opinion states that with respect to a penal statute the offense must be found in the words of the statute, and not by implication; that notwithstanding the act complained of in the indictment, might be within the spirit of the law, yet, not being within the letter, the indictment stated no offense.

The Congress, in enacting the law of March 2, 1907, used the word "construction," in its ordinary meaning. When Congress said "construction," it did not mean "interpretation."

The Courts have long distinguished between "interpretation" and "construction."

It is said in Bloomer vs. Todd, 3 Wash. Ter., 612 (S. C., 19 Pac. Rep., 135, 138):

> "Interpretation differs from construction in this: that it is used for the purpose of ascertaining the true sense of any form of words, while construction involves the drawing of conclusions regarding subjects that are not always included in the direct expression."

In Proprietors of Morris Aqueduct ads. Jones, 36 N. J. Law, 206, the Court quotes from the definition of Dr. Lieber in his Hermeneutics, where it is said that "interpretation is the mere finding of the true sense of the special form of words used;" that, "construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text—conclusions which are in the spirit though not within the letter of the text."

The Supreme Court of Nebraska in the case of State *ex rel* Hastings, Attorney-General vs. Smith, 35 Nebraska, 13, 22, adopts the same rule.

The Court of Appeals of New York, in the case of People *ex rel* Twenty-third Street R. R. Co. vs. Commissioner of Taxes of the City of New York, 95 N. Y., 554-559, also adopts the distinction made by Dr. Lieber between "interpretation" and "construction" of a statute. We find that construction is entirely different from interpretation.

In the case of Deane vs. State, 159 Ind., 313, the Supreme Court of Indiana had occasion to pass upon the question of whether, under the statutes of that State, providing for a direct appeal to the Supreme Court in all cases where there was a construction of a statute by the trial court, the trial court had construed a statute or had merely passed

upon the sufficiency of the indictment as measured by the statute. At page 316, the Court said:

> "Appellant's contention under the circumstances certainly cannot be said to present any question for the proper construction of the statute, within the meaning of the exception as declared in Section 8, *supra*, but rather, raises one which wholly relates to the construction of the pleadings. * * * Certainly the phrase, 'the proper construction of the statute' cannot be said to apply to or include a statute which is so plain in its terms and provisions as to leave no room for judicial construction, otherwise, the prohibition of Section 7 denying an appeal, could be easily evaded upon the mere assertion of the appellant that the point involved in the case depended upon the construction of the statute. Where the act is, under its terms and provisions, plain and unambiguous, and admits of but one meaning, it cannot be said to be open to a construction within the meaning of the exception in Section 8. Under such circumstances the law, if valid, must be taken and enforced as written, for it is not permissible to interpret or construe that which has no need of construction. The province of construction, as the authorities assert, lies wholly within the domain of ambiguity. Endlich on Interpretation of Stats., Sec. 4. Sedgwick on Statutory Const. (2 Ed.), 195. 23 A. & E. Ency. of Law, 298, and authorities cited in foot note 2. State vs. Sopher, 157 Ind., 360."

In Terre Haute, etc., R. R. Co. vs. Erdel, 158 Ind., 344, 347, the Court said:

> "Construction can only be employed for the discovery of the true intent and meaning of an instrument, and when the language is plain there

> can be no construction, because there is nothing to construe. It is preposterous to say that the law makers intended to authorize the bringing of a statute to this court by special proceeding, for construction or interpretation, when there existed no dispute nor ground for dispute as to its intent and meaning."

Chief Justice Marshall said in U. S. vs. Wiltberger, 5 Wheat., 76, 96:

> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so."

Measuring the opinion of Judge Lewis by this statement, the statute was not construed. All that the Court below decided or determined was that the case at bar was not within the intention of the statute because the language of the statute did not authorize the Court to say so.

The question of whether or not Section 5440 is open to construction is not now before the Court on this motion. These cases are cited as illustrations of the meaning of "construction," and applying the definitions there laid down, of "interpretation" and "construction," the utmost that can be said of the decision of the Court below is that he interpreted the statute, but did not in any sense construe it.

The decisions of this Court, cited in the following pages of this brief, we contend, are determinative of this

motion and show conclusively that this Court is without jurisdiction.

In the case of Crary vs. Devlin, 154 U. S., 619, Chief Justice Waite dismissed a writ of error on the authority of Mining Company vs. Boggs, 3 Wall., 304, saying:

> "There could have been no decision of the Court appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question, did not exist. The judgment did not deny the validity of the statute but the existence of the facts necessary to bring the case within its operation."

Our contention in the case at bar is, that Judge Lewis, in the Court below, simply denied the existence of facts necessary to bring the indictment within the operation of the statutes claimed to have been violated. In order to give this Court jurisdiction, the construction of statute must have been the *controlling question decided by the Court below.*

Speaking through Chief Justice Fuller in Carey vs. Huston & Texas Central Railway, 150 U. S., 171, at page 181, the Court said:

> "In order to hold this appeal maintainable, as within the second of the above-named classes, (the fourth class in the enumeration of the statute), the construction or application of the Constitution of the United States must be involved as controlling; although on appeal or error all other questions would be open to determination, if inquiry were not rendered unnecessary by the ruling on that arising under the Constitution. Horner vs. United States, 143 U. S., 570."

In Eustis vs. Bolles, 150 U. S., 361, the Court said, at page 366, speaking through Mr. Justice Shiras:

> "It is settled law that to give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered, could not have been given without deciding it. Murdock vs. Memphis, 20 Wall., 590; Cook County vs. Calumet and Chicago Canal Company, 138 U. S., 635."
>
> "It is likewise settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment."

The Court then quotes from the case of Klinger vs. Missouri, 13 Wall., 257, 263, where among other things, it is said:

> " 'This Court will not take jurisdiction of the case even though it might think the position of the State Court an unsound one.' " (Having reference to the other question, not Federal, decided by the State Court.)

In the case of the Missouri Pacific Railway Company vs. Fitzgerald, 160 U. S., 556, this Court, speaking by Chief Justice Fuller, said, at page 576:

> "We repeat what we said in California Powder Works vs. Davis, 151 U. S., 389, 393, that 'it is axiomatic that, in order to give this Court jurisdiction on writ of error to the highest Court of a State in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any Federal question that may also have been presented. Eustis vs. Bolles, 150 U. S. 361, and cases cited.' "

The Eustis-Bolles case is again affirmed in the case of Harrison vs. Morton, 171 U. S., 38, 47, where the language above quoted from the Eustis-Bolles case is embodied *verbatim* in the opinion written by Mr. Justice McKenna.

A construction of a statute is not necessarily involved because the right of one of the parties is based upon the statute. In Cameron vs. U. S., 146 U. S., 533, a proceeding was brought by the United States to compel the defendant to abate a wire fence by which he had enclosed a tract of public land. The Court said:

> "We are of the opinion that this case must be dismissed for want of jurisdiction by this Court. (There not being five thousand dollars involved.) Nor can our jurisdiction be sustained under the second Section of the Act of March 3, 1885, providing that the limit of five thousand dollars shall not apply to any case 'in which is

drawn in question the validity of a * * * statute of, or an authority exercised under, the United States.' "

"Since this refers to an authority exercised or claimed in favor of one of the parties to the cause, the validity of which was put in issue on trial of the case, and not to the validity of an authority exercised by the United States in removing the fence pursuant to the judgment of the Court. If the latter were the true construction, then every case in which the Court issued an injunction or an execution, might be said to involve the validity of a statute or an authority exercised under the United States, since it is by virtue of such authority that the marshal executes the writ. No question is raised here as to the validity of a statute; but merely as to the application of the statute to this case."

The same thing has been held repeatedly by this Court and particularly with respect to the rights of the locators of mining claims in the Western States. By the Acts of Congress, jurisdiction of suits relative to the right of possession of unpatented mining claims is conferred upon State Courts, notwithstanding that all rights relative to the possession of unpatented mining claims are conferred by Acts of Congress; yet such possessory actions do not raise Federal questions.

These cases are analogous to the one at bar, as in both cases the jurisdiction of this Court is conferred because of the construction of a Federal statute.

Mr. Justice Brewer, in delivering the opinion of this Court in Shoshone Mining Company vs. Rutter, 177 U. S., 505, reviewed the entire subject in relation to the question of when a Federal question is involved, at page 507. He said:

> "We pointed out in the former opinion that it was well settled that a suit, to enforce a right which takes its origin in the laws of the United States, is not necessarily one arising under the constitution or laws of the United States within the meaning of the jurisdiction clauses; for if it did, every action to establish title to real estate (at least in the newer states) would be such a one, as all titles in those States come from the United States or by virtue of its laws."

At page 509 it is held that the so-called "adverse suit" does not necessarily involve the Constitution or laws of the United States, notwithstanding such suits are authorized by the laws of Congress. At page 513, the Court said:

> "The mere fact that a suit is an "adverse suit," authorized by the statutes of Congress, is not, in and of itself, sufficient to vest jurisdiction in the Federal Courts."

To same effect in Dower vs. Richards, 151 U. S., 658, 662, 666.

Mr. Chief Justice Fuller, in the case of Ferry vs. King County, 141 U. S., 668, said, at page 673:

> "We have repeatedly held that the validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. Snow vs. U. S., 118 U. S., 346, 352. Baltimore and Potomac Railroad vs. Hopkins, 130 U. S., 210. Cook County vs. Calumet and Chicago Canal Co., 138 U. S., 635."

In the case of Snow vs. U. S., 118 U. S., 346, referred to in the above opinion, came to this Court on a

writ of error to the Supreme Court of the Territory of Utah, to review the judgment of that Court in affirming a judgment of conviction of the plaintiff in error. The question of the jurisdiction of this Court was not suggested by counsel for the reason that both parties desired a decision upon the merits, the conviction relating to matters affecting the Mormon Church. In dismissing the writ of error, the Court held that there was not a construction of a statute, nor did it involve the validity of a treaty or statute or authority exercised under the United States.

"All that is drawn in question is whether there is or is not error in the administration of the statute."

We contend that the utmost that can be said of the case at bar is a question of whether or not there was error in administration of the statutes involved.

The case of Cook County vs. Calumet and Chicago Canal Company, 138 U. S., 635, was dismissed because of want of jurisdiction. The suit was concerning swamp lands, granted by an Act of Congress within the limits of Cook County. At page 651, the Court said:

> "The rule is settled that to give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision by the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered, could not have been given without deciding it. De Saussure vs. Gaillard, 127 U. S., 216. Johnson vs. Risk, 137 U. S., 300. Tested by this rule, this writ of error cannot be sustained."

The Court held that notwithstanding that the rights were based upon Acts of Congress, no Federal question was involved.

In Bushnell vs. The Crook Mining Company, 148 U. S., 682, the Court held, at page 690, quoting from Roby vs. Colehour, 146 U. S., 153, 159, that:

> "It must appear from the record of the case, either, that the right so set up and claimed (under the Constitution or laws of the United States) was expressly denied, or that such was the necessary effect in law of the judgment."

In Giles vs. Teasley, 193 U. S., 146, in dismissing the writ of error, the Court said, page 160, that:

> "At all events, it must appear from the record by clear and necessary intendment that the Federal question was directly involved, so that the State Court could not have given judgment without deciding it. It is equally well settled that if the decision of a State Court rests on an independent ground—one which does not necessarily include a determination of the Federal right claimed—or upon a ground broad enough to sustain it without deciding the Federal question raised, this Court has no jurisdiction to review the judgment of the State Court. New Orleans vs. New Orleans Water Works Company, 142 U. S., 79. Eustis vs. Bolles, 150 U. S., 361. Dower vs. Richards, 151 U. S., 658, 666. Waide vs. Lawder, 165 U. S., 624, 628."

In Sloan vs. U. S., 193 U. S., 614, the Court said at page 620:

> "The construction of a treaty is used only as an argument upon the issue directly in question, viz., the construction of the statute * * *. The construction of these various treaties was not substantially, or in any other than a merely incidental or remote manner, drawn in question, and therefore a direct appeal to this Court can-

not be sustained. We think the appeals come within the principle of Muse vs. Arlington Hotel Company, 168, U. S., 430; Western Union Telegraph Co. vs. Ann Arbor Railway Co., 178 U. S., 239; and Lampasas vs. Bell, 180 U. S., 276, which hold that where the suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the Constitution or laws and that jurisdiction cannot, under such circumstances, be maintained of a direct appeal to this Court from the Circuit Court."

In Caro vs. Davidson, 197 U. S., 197, the Court said, at page 200:

> "The contention is that the judgment of the Supreme Court proceeded upon this act which was invalid, if so applied, because *ex post facto;* and that, therefore, this Court has jurisdiction inasmuch as the validity of the Act was thus drawn in question and its validity sustained. Yet no definite issue as to the validity of that statute was distinctly deducible from the record, no decision in favor of its validity appeared therefrom, and the judgment might have rested on grounds not involving its validity."

In the case of Empire State-Idaho Mining Co. vs. Hanley, 205 U. S., 225, the Court dismissed the case for want of jurisdiction. At page 233, the Court said:

> "In World's Columbian Exposition vs. U. S., 56 Fed. Rep., 654, 657, Mr. Chief Justice Fuller, speaking for the Court said: 'Cases in which the construction or the application of the Constitution is involved or the constitutionality

of any law of the United States is drawn in question, *are cases which present an issue upon such construction* or application or constitutionality, the decision of which is controlling; otherwise every case arising under the laws of the United States might be said to involve the construction or application of the Constitution or validity of such laws.' "

The case of Budzisz vs. Illinois Steel Co., 170 U. S., 41, was an action of ejectment, in which the defendant alleged that the title to the land in dispute was still in the United States; that the Indian title had not been extinguished; that any patent which might have been issued theretofore was null and void. The Court, on motion, struck out the allegations with respect to the patent. It was contended that the construction of certain Indian treaties was in issue. At page 44, the Court held that the mere allegation in the pleadings to that effect would not create such a case as to give the Supreme Court jurisdiction; that the invalidity of the entries and patents did not arise out of any misconstruction or breach of any treaty, but solely on the misconduct of the officers of the Land Department.

The case of Muse vs. Arlington Hotel Co., 168 U. S., 430, was another action of ejectment, the plaintiff claiming title to lands in Arkansas, through a grant from the Governor of Louisiana prior to the Louisiana Purchase by the United States. It was contended that the suit involved the construction of a treaty between the United States of America and the French Republic, and also, that their title depended upon the Fifth Amendment to the Constitution. It was held (page 436), that in deciding the case on demurrer and dismissing the bill, the Circuit Court "decided no question as to the application or construction of the Constitution

or the validity or construction of the treaty." Further (at page 437), that the claim was barred by the statute of limitations,

> "but that was a matter of construction, and the constitutionality of the Act, if held to apply to the claim rather than to the amenability of the United States to suit, was not considered; nor does it appear that the judgment of the Circuit Court was invoked upon it; * * * that the limitation operated on the jurisdiction and not on the right, and that to bar title, if suit were not brought within ninety days, was so unreasonable that the intention to do so could not be imputed to Congress. * * * The Circuit Court also held that plaintiff's title failed because of noncompliance with the Spanish law. It was not pretended that the Treaty, the validity of which was confessedly not in dispute, could be so construed as to compel judicial recognition of unconsummated claims, and it was for the Circuit Court to determine into what category the alleged grant fell. *In doing so, the construction of the Treaty was not drawn in question in any manner.*"

In Spencer vs. Duplan Silk Co., 191 U. S., 526, plaintiff brought an action in *trover* in the State Court, which was later removed to the Federal Court, on the ground of diverse citizenship. It was contended that the jurisdiction of the Federal Court did not depend entirely on the diversity of citizenship,

> "because the suit arose under the laws of the United States, and that, therefore, jurisdiction rested also on that ground."

The plaintiff was a Trustee in Bankruptcy, and it was claimed that because his title was based upon Federal laws

the suit itself involved a federal controversy. The validity of the Federal Bankruptcy Act was conceded, and no right specially set up or claimed under it, was denied. This Court dismissed the writ for want of jurisdiction.

The case of New Orleans Water Works Co. vs. Louisiana, 185 U. S., 336, was a proceeding in the nature of *quo warranto* to forfeit the charter of the Water Works Company. The trial court found in favor of the Water Works Company. On appeal to the Supreme Court of Louisiana that Court reversed the trial court and decreed a forfeiture of the charter and all franchises theretofore conferred upon the company. It was contended in this Court, by the Water Works Company, that the decree of the Supreme Court of Louisiana was a breach of contract, deprived it of property without due process of law, and was a denial of equal protection of the laws. But it was held by this Court (page 351), that no Federal question was involved, nor any other question sufficient to enable this Court to take jurisdiction of the case.

In California Powder Works vs. Davis, 151 U. S., 389, suit was brought to quiet title to certain land in California, both parties claiming under patents from the United States, there being two patents issued to the same land. The Supreme Court of California held that one of the grants was void, and the case was brought by writ of error to this Court, on the ground that a Federal question was involved as well as the treaty with Mexico. At page 393, the Court held that notwithstanding a special claim may have been duly made under the treaty and laws of the United States, yet that claim was unavailing because the grant under which the plaintiff claimed was simulated, "and this was a ground sufficient to sustain it, involving no Federal question."

In the case of United States vs. Lynch, 137 U. S., 280, a writ of *mandamus* was issued by the Supreme Court of the District of Columbia against the Fourth Auditor and Second Comptroller of the Treasury of the United States, commanding them to audit petitioner's account for certain traveling expenses. Judgment was rendered, denying the relief sought and dismissing the petition. It was contended that this Court had jurisdiction because "the validity of an authority exercised under the United States was drawn in question." The Court held that notwithstanding the rights of the petitioner were founded upon the authority of the laws of Congress, yet the act required of the respondents was merely ministerial. At page 285, the Court said:

> "The validity of the statute, or the validity of an authority is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry. We think that the authority of the Second Comptroller and the Fourth Auditor is not thus denied here, nor the validity of that authority questioned, *but what is claimed is that in the exercise of the valid authority, the Auditor and Comptroller erred in respect to an allowance.*"

That is exactly the case at bar. The Court below did not deny the validity of the statute, nor in any sense construe it to the prejudice of the United States, but did hold that the indictment did not plead sufficient facts to bring it within the letter of the statute, and in this holding, it is alleged by the Government, the Court committed error, nothing more.

The assignment of error can mount no higher than the ruling to which it is directed. The Court below said (Record, page 95):

> "The only offending charge against the defendants is that by their procurement the entrymen acted for the corporation. The act does not denounce what they did as criminal (referring to the coal land law), nor does it place a prohibition against their conduct so that we could say their acts were therefore unlawful."

This is not construction. If there is any error at all here, it exists in an erroneous reading of the indictment and erroneous application of the law to the indictment, and not in any construction of any statute. When the Court said that the coal land law "does not denounce what they did as criminal," he did not construe the coal land law because there is not a syllable, word or sentence contained in that law, which even hints that a violation of that law could be in any sense made the basis of a criminal prosecution.

United States *ex rel* Taylor vs. Taft, Secretary of War, 203 U. S., 461, was another *mandamus* proceeding in the Supreme Court of the District of Columbia, to compel the Secretary of War to restore the petitioner to a position from which the Secretary had dismissed her, and as a ground of relief it was alleged that the dismissal was not in conformity with the Executive regulations, in that no reason for removal had been furnished, and further, that the real reason was because of political opinions.

A demurrer to the answer was overruled and judgment entered denying the writ. It was held that there was not involved the validity of any authority exercised under the United States; that the violation of rules and regulations of the Civil Service did not draw in question the validity of any authority exercised under the United States, but simply the construction and application of regulations to the exercise of such authority.

In District of Columbia vs. Gannon, 130 U. S., 227,

suit was brought against the District of Columbia to recover for personal injuries. The jurisdiction of this Court was invoked because it was contended that the validity of the authority conferred upon the District Commissioners by Congress was drawn in question in the suit, because of certain instructions given the jury by the trial court, in which it was stated generally that as the Government of the District of Columbia was imposed without any power or opportunity on the part of the people therein to either accept or reject, the district could not be held responsible for the negligence of such Government; that as the officers of the District are appointed and paid by the United States, without power to levy taxes or expend money except as directed by Congress, it was not of such a character as to make the District responsible in damages for any negligence of such officers. At page 229, the Court said:

> "We do not agree with counsel in this view. The instructions above quoted *involved* the Acts of Congress creating the District government only as bearing upon the question of the liability of the District for negligence in failing to keep the streets in repair, *and by way of construction, and the validity of the Acts themselves, or of the authority exercised under them, was not denied.*"

In the language of the foregoing opinion we might well say of the decision of Judge Lewis, that "by way of construction, and the validity of the acts themselves, or of the authority exercised under them was not denied" by him, but in every particular gave to the statute full force and effect, and simply denied the existence of sufficient facts. The case *involves* the Acts of Congress only as defining the alleged crime. A gauge by which the indictment was measured.

In Sayward vs. Denny, 158 U. S., 180, it was contended that in the admission of the evidence the trial court violated the right guaranteed the defendant by the Constitution and laws of the United States, in that it admitted a record of a judgment against the defendant in which the defendant was never served with process and never appeared in the action, nor was he within the jurisdiction of the Court rendering said judgment, thereby depriving the defendant of his property without due process of law and denying him the equal protection of the laws, and was adverse to the right, privilege and immunity of the defendant (plaintiff in error here) under the Constitution.

It was held that no such rights were involved as would give this Court jurisdiction, and at page 186, the Court said:

> "We may add that the decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated, unless their conclusions are absolutely free from error."

In Mutual Life Insurance Company vs. McGrew, 188, U. S., 291, an action was brought upon a policy of insurance. It was contended that the interest of the defendant in error in the insurance policy was based upon a treaty, and should be construed by the Hawaiian law, McGrew being a resident of the Hawaiian Islands. It was held (page 309), that the pleading of the Hawaiian law did not amount to an assertion of any right under a treaty. At page 312, the Court said:

> "The Supreme Court of California held that the Hawaiian statute had no force in California except by comity; accorded full effect to the decree of divorce as dissolving the bonds of matri-

> mony, but decided that Mrs. McGrew was not affected by the statute because she was not domiciled in Hawaii, and was domiciled in California when that decree was rendered and when the statute could have operated if she had been domiciled in Hawaii, and that the statute had no operation upon her or her personal property here, for the law which governs personal property is the law of the domicile."

To the effect that this decision did not involve a Federal question, the Court cited the case of Roth vs. Ehman, 107 U. S., 319, and other cases.

It was contended by the Insurance Company that the decision of the Supreme Court of California was in conflict with Section 1, Article IV. of the United States Constitution, providing that full faith and credit in each state shall be given to public acts, records, and public proceedings of every other state, and that at the time of the decision the constitutional provision applied to Hawaii. As to this proposition, the Court said (page 313):

> "But an alleged right under a treaty between two foreign nations is inconsistent with the alleged right arising under the Federal Constitution, and as a right under the Constitution it was not at any time or in any way brought to the attention of the State Courts. * * * We cannot retain jurisdiction on the ground of the assertion of a Federal right which did not exist when the judgment was rendered in the trial Court, and which was not brought to the attention of the highest Court of the state in any way whatever."

At the present term, the Court decided two cases in which similar questions were involved. The first was that

of Leathe vs. Thomas (207, U. S.), decided November 11, 1907. The Court said:

> "It is admitted that the general and well-settled rule is that in a case coming from a State Court, this Court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions. Murdock vs. Memphis, 20 Wall., 590. Sauer vs. New York, 206 U. S., 536, 546. It is admitted further, that a decision upon those questions must have been necessary to the decision of the case, so that, if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed, as the case may be. Murdock vs. Memphis, *supra*. But Murdock vs. Memphis does not stop there. It further establishes that when the record discloses such other and completely adequate grounds this Court commonly does not inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result. 20 Wall., 590, 635. Eustis vs. Bolles, 150 U. S., 361, 369. Castillo vs. McConnico, 168 U. S., 674, 679."

The other case is that of the Arkansas Southern Railway Co. vs. The German National Bank (207 U. S.), decided December 2, 1907, where it is said:

> "But, according to the well-settled doctrine of this Court with regard to cases coming from State Courts, unless a decision upon a Federal question was necessary to the judgment, or in fact, was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a

ground, if the judgment also is supported upon another which is adequate by itself, and which contains no Federal question, the same result must follow, as a general rule. Moreover, ordinarily this Court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. Murdock vs. Memphis, 20 Wall., 590. Hale vs. Akers, 132 U. S., 554. Leathe vs. Thomas, Nov. 11, 1907 (207 U. S., 93). Therefore, if we should be of opinion, as we are, that the Supreme Court rested its judgment upon principles of common law as it understood them, we should go no farther, although that Court also upheld and relied upon the statute, whether, in our opinion, its views were right or wrong."

The cases cited are authority that although the record disclose a construction of a statute, or that constitutional rights are asserted, it will not change the real character of the controversy and make it a case in which the controlling rule of decision involves the construction of a statute or application of the Constitution.

So in the case at bar, notwithstanding the pleadings may have raised questions of the construction or validity of Section 5440 or Section 4746 of the Revised Statutes of the United States, yet that fact alone would not make the case at bar one in which the controlling rule of decision involved a construction of either of those Sections.

All that is necessary to make the above-cited cases controlling in the case at bar, is a substitution of the words "construction of a statute" for "Federal question." As to the first count in the indictment, the Court below did not pass upon the validity of any statute. The Court based its

opinion solely upon the common law; applied the common law interpretation to the word "defraud"; refused to enlarge upon the words of the statute, or extend it by intendment; but gave each word in the statute, its full, true meaning, and refused to *construe* the statute by holding that acts, which might be said to be within the spirit or intent of the act, were, therefore, prohibited.

Can it be said that because a court applies a statute to a criminal pleading, the statute must be, and thereby is, construed? If this is the case, then, as has been repeatedly said by this Court, every case, in which some right involved is based upon a statute, would involve statutory construction. The measuring of a pleading by a statute does not involve a construction of the statute, *nor does the giving to the words of a statute a common law, or judicially determined, meaning, constitute construction.*

If the Court below was in error in its interpretation and application of the common law, and in holding that the acts pleaded in the indictment were not within the letter of the statute, it would not confer jurisdiction on this Court.

As is said in Arkansas So. Ry. Co. vs. German National Bank, *supra*:

> "If we should be of the opinion, as we are, that the Supreme Court rested its judgment upon principles of common law, as it understood them, we should go no further, although that Court also upheld and relied upon the statute, whether, in our opinion, its views were right or wrong."

The decision of the Court below rests entirely upon a construction of the indictment and the decision is based solely upon the sufficiency of the indictment as a pleading,

and does not rest, nor is it based, upon the construction of either section of the statutes referred to. For these reasons, we contend that this Court has not jurisdiction of the writ of error under the provisions of the Act of March 2, 1907, and the writ should be dismissed.

Respectfully submitted,

EDWIN H. PARK,

Counsel for F. W. Keitel, Arie Keitel, Frank P. Fay, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck and Gus Haberbeck, Defendants in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1907

THE UNITED STATES, *Plaintiff in Error,* VERSUS F. W. KEITEL, ARIE KEITEL, FRANK P. FAY, LOUIS M. RUMSEY, WILLIAM BAER, WALTER S. PRICE, CHARLES F. W. HABERBECK, MAGDALENA HABERBECK, CHARLES H. DODGE, ANNA DODGE AND GUS HABERBECK, *Defendants in Error.*	Error to the District Court of the United States, within and for the District of Colorado.

STATEMENT.

This is an indictment in two counts charging the twelve defendants with violating Sec. 5440, Revised Statutes of the United States. The first count (Record, pp. 2-5), charges that the eleven defendants conspired with eight other persons named in the indictment "and also

with divers other persons to the grand jurors unknown" to make fraudulent entries, declaratory statements, applications to enter, powers of attorney, non-mineral affidavits and affidavits at purchase in said entries, of coal lands at the United States Land Office at Glenwood Springs, in Garfield County, Colorado.

It is alleged that on the 11th day of June, 1904, "in the County of Garfield, in the County of Routt, in the County of Denver, and within the District of Colorado, and within the jurisdiction of this Court," the defendants did then and there, etc., conspire and combine. (Record p. 2.)

It is further charged that the object of the conspiracy was not only to enter certain tracts of coal lands mentioned and described in the overt acts, but to make representations and statements of facts to the Register and Receiver at the said land office for the purpose of causing the Register and Receiver and the Commissioner of the General Land Office to act and administer the laws and regulations of the land office otherwise than they would or lawfully could act. It further charges as another object of the conspiracy the procuring of divers entrymen to make entries of coal lands with moneys furnished by the defendants, and thereafter to procure a conveyance from such entrymen to the defendants or to the Yampa Anthracite Company, a corporation named in the indictment but not made a party; and a further object of the conspiracy is alleged to have been the defrauding of the United States of valuable property in such coal lands, and also of its governmental functions in its right to administer an intelligent and honest service respecting the interests of the people of the United States. (Record, p. 4.)

The indictment is indorsed as being a violation of

Sec. 5440 of the Revised Statutes of the United States, and as to the first count that section is the only section claimed by counsel for the government in the court below to have been violated.

There is no allegation in the first count which points or hints at the commission of any crime, or that the aim or object of the said conspiracies was unlawful, unless it can be said that the furnishing of the entrymen with the money to pay for the lands entered is unlawful, or that it was unlawful for entrymen to enter into a contract for conveyance of their right to enter or convey the lands entered after patent, but no agreement therefor is alleged except by inference. There is no allegation that the entrymen named, or the "divers other persons to the grand jurors unknown," who did make entries, did not at the time of making such entries possess all of the qualifications required by the laws to make such entries; nor is it alleged that any of the entrymen made entries of coal lands in excess of the amount allowed by law to be entered by each respectively. It is not charged that any of these defendants were officers, directors or even stockholders of the Yampa Anthracite Company.

It is further alleged in the first count that the objects of this conspiracy would be a violation of the rules and regulations of the Land Office, and the obtaining of the amount of land alleged in the indictment was more than any or all of the defendants and the corporation would lawfully be allowed to obtain under a lawful administration of said laws and regulations. Nowhere in the count are any rules and regulations set out which are alleged to have been violated.

In the first count in each of the said 24 overt acts (Record pp. 5-16) the defendants F. W. Keitel and Arie

Keitel are charged with doing some specific act with reference to the entry of specific tracts of lands in Routt County, charging each and every of the papers described in the said overt acts to have been false, fictitious, forged and fraudulent, without specifying in what particular the said papers are subject to any of such adjectives, nor are any of the said alleged false, fictitious, forged or fraudulent papers set out in any of the said overt acts.

In the second count (Record, p. 16) the defendants are alleged to have entered into a conspiracy to violate Sec. 4746 of the Revised Statutes of the United States, by procuring to be filed in the office of the Secretary of the Interior and within his jurisdiction certain papers, affidavits, etc., alleged to have been false, fictitious, illegal, feigned and fraudulent, in violation of the laws and the regulations of the Department of the Interior respecting the entry of coal lands, but does not set out any of the rules or regulations alleged to have been violated.

Sixteen overt acts (Record pp. 19-46) alleged are with respect to powers of attorney, but nowhere in the count is there pointed out wherein any of such documents were false, fictitious, feigned, illegal, forged or fraudulent, although in the allegation respecting such documents all of those adjectives are used. Nowhere in the second count is it alleged that the entrymen executing such powers of attorney, did not at the time of making the entry and executing the power of attorney possess all of the qualifications prescribed by law to make entries and to execute such powers of attorney.

In neither count is it alleged that any entry was to be made by any person other than the entryman himself. It is not charged in either count that any entry was to be

made by any persons other than the entryman, nor is it charged that the entryman was falsely impersonating any other person in any respect whatever.

It appears however, that the entries made were made by one or two of the defendants under powers of attorney executed by true entrymen.

Motions to quash the indictment and both counts thereof, were filed separately, by the several defendants, (see Transcript of Record, pages 47 to 81,) but the grounds of each of the several motions of the several defendants were practically the same. Upon the submission of the motions the trial Court took the same under advisement, and upon the 30th day of December, 1907, entered an order sustaining the several motions, quashing the indictment and both counts thereof and dismissing the defendants, the reasons therefor being stated by the Court in a written opinion set out in the transcript at pages 87-100. Thereupon the Government sued out this writ of error to review the decision of the Court below.

Under the first count it appears that only 1,880 acres were filed upon and entered; under the second count 2,600 acres are alleged to have been filed upon; but in the second count all of the false, fictitious, feigned, illegal, forged and fraudulent papers are alleged to have been filed in the office of the Register and Receiver at Glenwood Springs, and not in the office of the Secretary of the Interior. Nor is it alleged that such papers were ever sent there. The first ten overt acts in the second count relate to the filing of powers of attorney. The 11th, 12th, 13th, 14th and 15th overt acts are alleged to have been the filing by F. W. Keitel and Arie Keitel, of coal declaratory statements, powers of attorney, non-mineral affidavits and corroborating non-mineral affidavits in different coal entries. The

16th overt act is alleged to have been a forged application of Kate M. Kaplinger. Each and every of the overt acts of the second count was the filing of various papers in the Land Office at Glenwood Springs, Colorado, and nowhere else. Nowhere in either count, nor in the overt acts, does it appear that more lands were sought to be entered than the various entrymen were entitled to enter under the law.

The only paper required to be filed by the law is the application to enter. Every other paper, document, or affidavit mentioned in the overt acts are papers only required by the rules and regulations of the land office.

MOTION TO DISMISS.

At the outset, it is the contention of the defendants in error that this Court is without jurisdiction to hear or determine this cause for the reason that it appears from the record herein, and from the decision of the Court below, that the *gravamen* of such decision was not based upon the construction of a federal statute as is required by the Act of March 2, 1907, entitled, "An Act Providing for Writs of Error in Certain Instances in Criminal Cases." As the Court below decided other questions, not involving the construction of a federal statute, against the plaintiff in error, the decision of such questions was and is wholly sufficient to sustain the judgment herein rendered. A motion to this effect was filed by the defendants in error, and such motion was by the Court continued for argument at the final hearing.

Without repeating it here, the defendants beg to refer to their argument now on file in this Court, with the motion to dismiss, and submit that under the authorities there cited the writ of error should be dismissed.

ARGUMENT ON THE MERITS.

Without waving their motion to dismiss this writ of error, the defendants in error contend that the judgment and order of the Court below should be sustained for the following reasons:

First.

That the Court rightly held that the first count did not charge a crime under the Federal Statutes because no Federal Statute is alleged to have been violated. Only crimes made such by statute are subject to criminal prosecution under the Federal laws, and before an act can be punished that act must be specifically made a crime by statute, by express language, and not by inference or implication.

Second.

The Court rightly held that the first count in the indictment did not state any crime known to Federal law for the following reasons:

(A) That only a breach of rules promulgated by the Department of the Interior are alleged to have been violated. A breach of such rules cannot be made the basis of a criminal prosecution.

(B) The Court rightly held that Sec. 5440 of the Revised Statutes of the United States makes the object of the conspiracy criminal and not the means employed.

(C) That the second clause of Sec. 5440 of the Revised Statutes relating to fraud, only relates to frauds made criminal by the common law, and not to constructive or equitable frauds; and the defendants in error contend that the Court could rightly have gone further and held that that part of the section relating to fraud is too indefinite and uncertain as a basis for a criminal prosecution, and is

in violation of the Sixth Amendment to the Constitution of the United States.

(D) The Court rightly held that no crime was charged in either count of the indictment because the Government in disposing of the public lands is not acting in a governmental capacity, but simply as a private corporation or as trustee of a self-imposed trust. The entry being a contract, the violation of any rules or regulations or statutes respecting the disposal of public lands would be a civil tort and not *per se* criminal.

THIRD.

The ruling of the Court below was right because the Department of the Interior has, since the passage of the coal land act, uniformly construed the words "not exceeding 160 acres to such individual or 320 acres to such association," and the words "only one entry by the same person or association of persons" to be words of limitation and not prohibition.

FOURTH.

The decision of the Court below was right because the Department of the Interior has always construed a breach of any statute or regulation of the Department relating to coal lands to be merely a civil fraud and the basis of an equity suit, and not the basis of a crime.

FIFTH.

The coal land law is a part of the mineral laws of the United States and must be construed together with all the mineral laws.

SIXTH.

The decision of the Court below was right because the construction placed upon the coal land laws was in line with

the contemporaneous construction of the same statutes by the Courts and by the Departments whose duty it is to enforce such laws.

SEVENTH.

The decision of the Court below was correct because the Court followed the construction placed thereon by the Department whose duty it is to enforce such laws, and such construction is not obviously contrary to the terms of the statute. The Courts will follow the construction of a law by a department of the government, and where the Courts have followed such construction for a long term of years it practically becomes a rule of property.

EIGHTH.

The decision of the Court below was right because to have held otherwise would have been an invasion of the right of alienation of vested property, which right cannot be abridged by Congressional act; and in the disposal of public lands unless there is express legislation prohibiting alienation, thus making the vesting of the title contingent in that particular, the alienation of any right with respect to public lands cannot be made the basis of even a suit in equity to vacate the patent, much less a criminal prosecution.

NINTH.

With respect to Sec. 4746 the decision of the Court below was correct because none of the acts complained of in the second count of the indictment are in violation of any of the provisions of said section as amended by the Act of July 7, 1898.

TENTH.

The decision of the Court was correct with respect to the second count because Sec. 4746, Revised Statutes of the

United States, is no longer in force, being amended and superseded by the Act of July 7, 1898.

ELEVENTH.

The Government having alleged in the body of the second count of the indictment that the acts were in violation of Sec. 4746 of the Revised Statutes of the United States, cannot now or hereafter assert that the acts are in violation of any other section of the Federal laws so as to retain the count, because it would be in violation of the Sixth Amendment to the Constitution of the United States.

TWELFTH.

The defendants in error contended in the Court below, and here contend, although not decided by the Court below, that the indictment and both counts thereof are bad for duplicity.

THIRTEENTH.

An indictment for conspiracy must be specific, and must make a sufficient charge, irrespective of any averments in the overt acts and cannot be aided thereby.

FOURTEENTH.

Irrespective of the decision of the Court below, the defendants in error contend that the Government is estopped from claiming that any of the acts set out in either count of the indictment as violations of the coal land law, is a crime, because of the uniform construction of the Department of the Interior for nearly thirty-five years, by its rules and decisions, by its construction of the Statutes, and by the failure of the Government during that period to prosecute any one criminally, although many coal land entries have been made under similar circumstances and con-

ditions, as alleged in the present indictment, and here complained of, and no one up to the present time has ever been prosecuted criminally for any of such acts, reference being particularly made to the facts stated in the case of United States vs. Trinidad Coal Company, 137 U. S., 160. Assignments of coal land entries have always been recognized, and the public generally led to believe that the same could be purchased by an assignee at any time, by virtue of Rule 37 of rules and regulations covering the disposal of coal lands, which rule has been in force from 1873 to 1907.

FIRST.

BEFORE AN ACT CAN BE PUNISHED AS A CRIME, UNDER THE FEDERAL LAWS, THAT ACT MUST BE SPECIFICALLY MADE A CRIME BY STATUTE.

In the presentation of this case counsel will take it for granted that the argument of the Government will be along the same lines taken by its counsel in the Court below, and as so outlined by the assignments of error, found on pages 103 and 104 of the printed record.

The foundation in the first count in the indictment is Sec. 5440 of the Revised Statutes as amended by the Act of May 17, 1879, and is as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars,

or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the Court."

Under this statute the object of the conspiracy must be some offense made criminal by some other Federal Statute, or, to defraud the United States in some manner. The object designated in the indictment primarily was to obtain the fee tile of coal lands as provided by Secs. 2347, 2348, 2349 and 2350, of Chapter 6, "Mineral Lands and Mining Resources," being classified under "Title XXXII.—The Public Lands," as follows:

"Sec. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the Receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Sec. 2348. Any person or association of persons severally qualified as above provided, who have opened and improved, or shall hereafter

open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: Provided, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Sec. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no as-

sociation of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant."

These sections embody every provision made by Congress respecting the disposal of the "Public Coal Lands of the United States." Any person over the age of 21 years, who is a citizen, or has declared his intention to become such, or association of persons, shall have the right to enter any quantity of coal land of the United States not exceeding 160 acres for one person, or 320 acres for an association, and shall receive a patent therefor upon the payment of $10 or $20 per acre, depending upon the location of the lands with respect to railroads. In the case at bar all of these entries were what is known as "cash entries," being entered under Section 2347 of the Revised Statutes. Secs. 2348 and 2349 have no bearing or application at all to the case at bar. Sec. 2350 reiterates the limitation upon the amount of lands which any person or association of persons may enter. There is no other limitation, prohibition or qualification named in the statute. There is no penalty

prescribed either in these statutes or anywhere else, by Act of Congress, respecting the violation of any of the provisions of the coal land laws.

Sec. 2351 of the Revised Statutes provides in the concluding portion thereof, to-wit: "The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for the carrying into effect the provisions of the four preceding sections."

It is the contention of the defendants that, before they can be convicted of any crime under this indictment, the Government must specifically point out some statute where the specific act charged in the indictment is made a crime. In the Court below this was not done, and the Court rightly held that the first count in the indictment was bad because the acts charged violated no criminal law of the United States.

There are no common law crimes known to the Federal laws. The powers exercised by the Government of the United States are delegated powers. The right to exercise common law jurisdiction in the courts of the United States was not among those delegated powers, so that the criminal jurisdiction of the Federal courts is statutory and everything with respect thereto is strictly construed; and before a Federal Court is authorized to say that any particular transaction is criminal, there must be some act of Congress expressly authorizing the Court to say so.

In United States vs. Brewer, 139 U. S., 278, an indictment was returned against the defendant for interfering with an election in the State of Tennessee. At page 287 the Court said, in passing upon the sufficiency of a demurrer to the indictment:

> "The statute does not provide distinctly and specifically in words required in a criminal stat-

ute, that the box shall be opened at the place where the election was held, and the names of the persons appearing in each ballot be read aloud. * * * *Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.* U. S. vs. Sharp, Pet. C. C., 118. *Before a man can be punished his case must be plainly and unmistakably within the statute.* U. S. vs. Lasher, 134 U. S., 624, 628."

In Todd vs. United States, 158 U. S., 278, an indictment was returned under Sec. 5406 R. S., U. S., with reference to a conspiracy in interfering with a United States Court. The indictment charged the defendant with interfering with a witness appearing before a United States Commissioner. Justice Brewer, at page 282, said:

> *"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms.* 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.' United States vs. Lasher, 134 U. S., 624; Endlich on the Interpretation of Statutes, Sec. 329, 2nd Ed.; Pomeroy's Sedgwick on Statutory and Constitutional Construction, 280."

And at page 283, Justice Brewer said:

> "Doubtless it is within the power of Congress to legislate in this direction fully for the protection of every witness called upon by the laws of the United States to give testimony in any

place and under any circumstances; Logan vs. United States, 144 U. S., 263, but it has not as yet seen fit to do so, and has only provided for his protection as a witness in the Court of the United States."

The indictment at bar falls within this rule, because there is no statute expressly creating and defining the acts charged, to be a crime, and it cannot be said to come within any terms of any criminal statute. Before it can be made a crime the acts must be by the Court construed to be such. As is well said by Justice Brewer, if Congress intended the acts here complained of to constitute the basis of a crime, it was doubtless within its power to so legislate; but Congress has not so legislated, and the Court cannot extend any existing law, by intendment, for the purpose of making the acts complained of a crime, however atrocious they may be.

In United States vs. Harris, 177 U. S., 305, a suit was brought against a receiver of a railroad to recover a penalty prescribed by the Act of Congress of August 13, 1888, relating to the transportation of live stock by railroad companies. The Government sought to have the Court construe the act liberally enough to make the word "company" embrace any one operating a railroad, particularly a receiver. Justice Shiras, at page 309, said:

*"But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit was brought. * * * Can we fairly bring receivers within the penal clause by reasoning from a supposed or apparent motive in Congress in passing the act? * * * Giving*

all proper force to the contention of counsel of the Government that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning.

"It is not permitted to courts in this class of cases to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subject to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

The Court then proceeds to quote from the opinion of Chief Justice Marshall in the Wiltberger case, 5 Wheat, 76, where that great jurist said:

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. *The case must be a strong one indeed which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous indeed to carry the principle that a case which is within the reason or the mischief of a statute is within its provisions so far as to punish a crime not enumerated*

in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule in other cases."

In United States vs. Britton, 108 U. S., 199, Justice Woods held, notwithstanding Sec. 5204 of the Revised Statutes of the United States, prohibits the declaring of a dividend by a national bank when there were no profits on hand, yet a conspiracy or agreement between the directors of such bank would not constitute a crime under Sec. 5440; that Sec. 5204 does not create an offense. That it was not penal in its nature.

No more can the language of the coal land statutes create an offense; they merely limit. The violation of a limitation may create the basis for equitable relief but not a criminal prosecution.

In Smith vs. Townsend, 148 U. S., 490, the Court held (opinion by Mr. Justice Brewer), that the prohibition, in the act opening the territory of Oklahoma, against persons invading the territory prior to 12 o'clock of the day of the opening, and declaring that any person who did violate the section and invade the territory should be forever barred from acquiring any right thereto, was not penal, and would be liberally construed as simply relating to the qualifications of the entrymen.

Judge Vandeventer, sitting with Judge Munger, in the Circuit Court of the District of Nebraska, in United States vs. Dietrich, 126 Fed., 676, had under consideration an indictment charging a United States Senator with

receiving bribes for aiding a certain party to procure an appointment as postmaster, a motion was made to quash the indictment. At page 678 Judge Vandeventer said:

> "Excepting that treason is defined by the Constitution, there are no crimes against the United States save such as Congress has expressly defined or recognized and made punishable. The Federal Courts have no jurisdiction over common law crimes. (Citing authorities.) In Tennessee vs. Davis, 100 U. S., 257, 275; 25 L. Ed. 648, the Supreme Court said upon this subject:
>
> 'Certain implied powers, it is admitted, must necessarily result to courts of justice, such as to fine for contempt or imprison for contumacy; but the jurisdiction of crimes against the authority of the United States is not among such implied powers, the universal rule in the Federal Courts being that the legislative authority of the Union must first make an act a crime, affix a punishment to it, and prescribe what courts have jurisdiction in such an indictment, before any federal tribunal can determine the guilt or innocence of the supposed offender.'
>
> (The Court then cites a number of other decisions, applying this rule.)
>
> "*The question, therefore,* in every criminal prosecution in the Courts of the United States, *is not whether the act charged is immoral or abhorrent to all right-minded members of society, but does any act of Congress make it criminal and provide for its punishment?*"

Judge Vandeventer held that because the defendant was only a Senator elect he did not come within the provisions of Sec. 1781, and therefore could not be held under the indictment.

In the case of United States vs. Chase, 135 U. S., 255, 259, 261, this Court held that a sealed and addressed letter was not a writing within the statute prohibiting the mailing of obscene matter, which statute did not use the word "letter," on the ground that if Congress intended to include such mailable matters as letters it was easy for Congress to say, so, and not having expressly said so, the mailing of an obscene sealed addressed letter was not a crime under the statute. To the same effect are

U. S. vs. Williams, 3 Fed., 484, 491.
U. S. vs. Comerford, 25 Fed., 902, 904.
U. S. vs. Wilson, 58 Fed., 768, 771.
U. S. vs. Whittier, Fed. Cases 16688.

In U. S. vs. Hewecker, 79 Fed., 59, 64, it was held that a Court could not pronounce an act murder unless every word sufficient to embrace the crime was found to be within the statute.

In re. McDonough, 49 Fed., 360, 362, the Court held that beer was not a spirituous liquor within the statute prohibiting the sale of spirituous liquor to Indians, on the ground that beer was a well known beverage, and if Congress intended to prohibit the sale of beer to Indians it would have said so. The same rule is affirmed by this Court in the case of Sarlis vs. U. S., 152 U. S., 570, 575, and Bate Refrig. Co. vs. Sulzberger, 157 U. S., 1, 37.

Where a statute specifies the effects of certain pro-

visions, Courts will presume that the effects intended by the lawmakers are there stated.

> Sec. 491 Lewis' Sutherland on Statutory Construction. 2d Ed.

Congress having legislated upon the subject, it must be presumed that it said everything it intended to say in respect to the sale and disposal of the public coal lands. That the limitation in amount without penalty was a sufficient safeguard, leaving the Government to its equitable remedies against violators of the intent and spirit of the law.

Penal laws are those which impose a fine or imprisonment, or impose a special burden, or take away or impair a privilege or right.

> 2 Lewis' Sutherland on Statutory Construction, Sec. 431, and cases cited in notes 26 and 27.

Therefore, we say, the coal land law being silent as to any penalty, there is nothing upon which to base a crime, and as we will show later in this brief, Sec. 5440 must have as the ultimate object of the conspiracy a violation of some act made criminal by an express statute. This Court cannot read into the words of limitation used in the coal land laws anything in the nature of a penalty, much less a crime; nor can the Court enlarge either Sec. 5440 or the coal land laws by implication, notwithstanding the Court should be of the opinion that the acts charged in this indictment were or are atrocious and should be in some manner punished. Suffice it to say that under the law and Constitution of the United States the defendants

cannot be punished in the manner and form here sought to be enforced.

SECOND.

NO CRIME STATED IN THE FIRST COUNT.

(A) *A breach of rules promulgated by a department of the Government cannot be made the basis of a criminal prosecution.*

It has been decided by repeated adjudications that no one has power under the Federal Constitution to make a law, or promulgate anything in the nature of a law, other than Congress; that notwithstanding a department of the Government, such as the Interior Department, may be empowered by Congress to promulgate rules, regulating and governing the disposition of the public domain, such rules can only affect the details of the disposition of public lands, but we must look to the statutes for those rules governing the rights and liabilities of the entrymen. Congress is the source of all law, and a violation of a rule promulgated by a department cannot be made the basis of a criminal offense.

This Court said in the case of United States vs. Eaton, 144 U. S., 677, speaking through Mr. Justice Blatchford, at page 688:

> "It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation * * * could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a crim-

inal offense punishable under Sec. 18 of the act. * * * It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense. * * * If Congress intended to make it an offense, * * it would have done so distinctly in connection with an enactment such as that above recited. * * * Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have in a proper sense, the force of law; *but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.*"

In the late case of Williamson vs. U. S., decided by this Court January 6, 1908, and reported in 207 U. S. at page 425, Mr. Justice White, who delivered the opinion of the Court, said with respect to the rules of a department (page 459).

> "Examining the items which the statute requires the applicant to make proof of, after showing publication, it is apparent that while some of the things referred to in the prior section, and which are required to be stated in the preliminary proof are reiterated, all requirement is omitted of any statement regarding a speculative purpose on the part of the applicant, his *bona fides,* and his intention to acquire for him alone.

> When the context of the statute is thus brought into view we are of the opinion that it cannot possibly be held, *without making by judicial legislation a new law*, that the statute exacts from the applicant a reiteration at the final hearing, of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifests were intended to be excluded therefrom."

And again, at the bottom of page 461 it is further said:

> "It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would be compelled to do that at the final hearing which the act of Congress must be considered as having expressly excluded in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it."
>
> As observed in Adams vs. Church, *supra* (193 U. S., 510), at page 517: 'To sustain the contention * * would be to incorporate * * a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject.' True it is, that in the concluding portion of Sec. 3 of the timber and stone act it is provided that 'effect shall be given to the foregoing provisions

of this act by regulations to be prescribed by the Commissioner of the General Land Office.' But this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred. As then there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit and had full power to dispose *ad interim* of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant, even under the broad rule which we have previously in this case applied, and therefore that error was committed not alone in instructing the jury that the indictment covered or could cover the procurement of perjury in connection with the final proof, and that the jury might base a conviction thereon, but in admitting the final proof as evidence tending to show the alleged illegal purpose in the primary application for the purchase of the lands."

To the same effect are the following:

U. S. vs. Verde Copper Co., 196 U. S., 207;
U. S. vs. Manion, 44 Fed., 800;
U. S. vs. Maid, 116 Fed., 650;

U. S. vs. Blasingame, 116 Fed., 654;
U. S. vs. Hoover, 133 Fed., 950;
U. S. vs. Matthews, 146 U. S., 303, 306;
U. S. vs. Pettus, 84 Fed., 796, 797, 798;
U. S. vs. Shinn, 14 Fed., 445, 453;
U. S. vs. Bedgood, 49 Fed., 54;
U. S. vs. Howard, 37 Fed., 666.

Turning now to the statutes, Secs. 2347, 2350 and 2351 R. S., U. S., for the requirements provided by Congress for an entry of coal lands, we find that the only requirement is that the person be 21 years of age and a citizen of the United States, or has declared his intention to become such, and that he has not exercised his right to file upon coal lands. When those conditions are made to appear to the Register and Receiver in any way, it is their duty to allow the entry, and upon payment of the required amount of money per acre in cash, to issue to such entryman a final receipt, and such entryman is thereupon entitled to a patent of the United States for the land.

The first count of the indictment bases the charge upon the filing of all sorts of papers, but when we turn to the overt acts we find that the defendants are charged with filing "papers, statements and affidavits therein, to-wit, declaratory statements, powers of attorney, non-mineral affidavits, corroborating non-mineral affidavits and application at purchase," (Record, pp. 5-6) for a specific parcel of ground. Other overt acts charge defendants with the procuring of certain persons therein named to make non-mineral affidavits. Not a single overt act charged is an act made criminal by any federal statute.

Secs. 2347 to 2351 inclusive R. S., U. S., do not require of a coal land entryman any of the statements,

papers, powers of attorney, or affidavits set forth and described in the 24 overt acts under the first count. As said in the Williamson case, *supra*, that to require as a lawful regulation these various papers, statements and non-mineral affidavits, would be the "making by judicial legislation" a new law.

> "As then there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit and had full power to dispose *ad interim* of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant."

The only paper filed which may be said to be required by the statutes is the application to purchase, but the indictment nowhere alleges that any of the entrymen had ever theretofore exercised the right; was not twenty-one years old or was not a citizen, or declared his intention to become such. No fact is alleged to show that they were not legally possessed of every qualification and entitled to make the affidavit required in the application, nor is there anything alleged in the indictment to the effect that the application was not bona fide and stated every fact contained therein truthfully.

Each entryman being in every respect qualified to make entry, there is no fraud. It is not alleged that the eleven defendants were not severally legally qualified to enter. The twenty-four overt acts only charge the entering of eighteen hundred and eighty acres, when the defendants were entitled to one hundred and sixty acres each,

or a total of seventeen hundred and sixty acres; but it is charged in the indictment that the defendants had conspired with eight other persons, each of whom, according to the indictment, were entitled to one hundred and sixty acres, making nineteen entries in all or three thousand and fifty acres as a grand total. Where each of the nineteen were entitled to enter, what fraud was committed?

(B) *The defendants contend that the Court below rightly held that Sec. 5440, R. S., U. S., is limited to cases where the object of the conspiracy is criminal, and not the means employed.*

At common law a conspiracy was defined to be the commission of a crime by lawful means, or the procuring by criminal means a lawful end.

Sec. 5440 is not as broad, and cannot be enlarged to embrace anything other than an object which is made criminal by some other Federal Statute.

The words "If two or more persons conspire either to commit an offense against the United States, or to defraud the United States," is a definition in itself, relating solely to the object to be attained by the conspiracy, and whatever the means employed in the conspiracy the object to be attained must be criminal.

The conspiracy statute of Colorado (Sec. 1294, Mills' Ann. St.), is practically the same as Sec. 5440, R. S., U. S., and reads:

> "If two or more persons shall * * * conspire or co-operate to do or to aid in doing any other unlawful act."

This statute has been expressly construed by the Supreme Court of Colorado to be limited to cases where the object of the conspiracy would be an unlawful act if com-

mitted, and that the doing of a lawful act in an unlawful manner was not within its provisions.

Connor vs. People, 18 Colo., 373, 378.
Miller vs. People, 22 Colo., 530, 533.
Lipschitz vs. People, 25 Colo., 261, 265.
Short vs. People, 27 Colo., 175, 184.

In the Pettibone case, 148 U. S., 197, Chief Justice Fuller, at page 203, speaking generally of a conspiracy, said that it was sufficiently described as the doing of an unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means, citing Commonwealth vs. Hunt, 4 Met., 111. But the limitation of Sec. 5440, defining conspiracy, is not referred to. As said in the cases cited under the first division of this brief, if Congress intended to make a conspiracy embrace the doing of a lawful act in an unlawful manner, it would have been as easy to say so, as it was to say that a conspiracy was the agreement between two or more persons "to commit any offense against the United States, or to defraud it." Therefore we say that the doing of a lawful act in an unlawful manner is not within the language of the act, and the Court cannot read into the act words importing the doing of a lawful act in an unlawful manner. The Court cannot enlarge the section by intendment. As Justice Shiras said, in the Harris case, 177 U. S., 305, 309 (*supra*):

> "We are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which the suit was brought; * * * that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning."

Using this language as a guide, it cannot be said that there is a single word in Sec. 5440 that could by the most liberal construction be said to embrace the doing of a lawful act in an unlawful manner. The section is directed against the commission of offenses made criminal by the statute and the defrauding of the United States.

The definition of the Chief Justice in the Pettibone case, *supra,* very clearly recognizes that a crime must be the basis, either of the means, or ultimate object of the conspiracy. It cannot be said that the first count is the committing of an offense against the United States, and therefore this conspiracy must have been to *defraud* the United States in some manner or for some purpose, and we must yet find in the ultimate object of the conspiracy a crime embraced in the word "defraud." We are not referred to any statute which has been violated, but the indictment itself states that the defendants procured patents from the United States, to lands unlawfully, in violation of the coal land laws, and procured the Register and Receiver to do those things which under the law, they had no right to do, if the law were properly administered, and further to deprive the United States of its control of valuable lands, and to interfere with the Government in its governmental functions, so that we say the definition of the Chief Justice in the Pettibone case applies to the case at bar, because the defendants are not charged with the doing of anything unlawful under the first count, but the object is the defrauding, as is said in the Pettibone case, "to accomplish a criminal or unlawful purpose." Now, unless we can find that unlawful purpose in the statutes, there is no crime stated in the first count.

In Britton vs. United States, 108 U. S., 199, the Court said, at page 206, that Section 5204 "does not of itself create any offense against the United States." That de-

claring a dividend contrary to the terms of Sec. 5204, not being an offense against the United States, any violation either in letter or in spirit of Sec. 5204 would not be the basis of a conspiracy to commit an offense made punishable by Sec. 5440. "We think this construction (that of Government counsel) of the statute is unwarranted, and that the indictment is based on a misconception of its provisions."

In the case of United States vs. Crafton, 4 Dill., 145, F. C. 14881, a demurrer was filed to an indictment for a conspiracy to defraud the United States, and was heard before Judge Dillon, Circuit Judge, and Krekel, District Judge, sitting in the Western District of Missouri. Under an act of the Legislature of Missouri providing for claims of officers and soldiers enrolled in the Missouri militia, the defendants prepared a muster and pay-roll of one of the companies of the Missouri militia, and presented it to the Auditor of the United States Treasury. It was admitted by the demurrer that the muster and pay-roll was fraudulently prepared and designed purposely to defraud the United States out of the money which an Act of Congress, then sought to be passed, should provide the payment for. Here is a case practically on all fours with the case at bar. Our indictment charges a design to cheat and defraud the United States out of coal lands, but there is no statute expressly making it a criminal offense to do any act charged to have been done in this indictment.

Now, can the defendants be held criminally liable for doing an act, or seeking to do an act not made criminal by some law of the United States? Judge Dillon said:

> "However fraudulent any ulterior design, or morally reprehensible the acts charged in the indictment may seem, our judgment is that Sec.

> 5440 of the Revised Statutes cannot be extended to a case where the fraud which the conspiracy contemplated can only be effected in case an Act of Congress shall be thereafter passed of a nature to fit the prior conspiracy and give it something to feed upon."

Crafton's act was as fraudulent, the design as reprehensible, yet it could not be consummated because there was no law at the time of the act, providing for the payment of the money sought to be collected.

The word "defraud" not being defined in the statute itself, nor in any other statute, it is to be presumed that Congress used the word "defraud" in its common law meaning, and we should turn to the common law to find what acts of fraud are held to be criminal. As said by Chief Justice Fuller in the Pettibone case, at page 203:

> "The Courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws or treaties of the United States, but *they resort to the common law for the definition of terms by which offenses are designated.*"

As said by the Court below: (Record, p. 94.)

> "Certainly the term 'defraud,' as here used, cannot be accepted in its broadest sense. If so, it would cover constructive fraud known only in equity. And thus until the Chancellor decrees on given facts, no man knoweth what offenses he hath committed. That sequence impresses me as a legal perversion."

Right here we may call the Court's attention to the case of Lake County vs. Rollins, 130 U. S., 662, where the

Court holds that an interpretation will not be given to a statute which would lead to injustice, oppression or absurd consequences.

Mr. Wharton in his work on Criminal Law, speaking of conspiracies to defraud, at Sec. 2316, said:

> "At the same time it is important to keep in mind, especially at this point, the principles heretofore announced. That indictments for conspiracy, always perilous to liberty from the extent and vagueness of the province which they overshadow, are never so much so as when they undertake to punish acts of whose intrinsic criminality the law gives no prior notice. If indictments of this class, by stress of settled adjudication, must be hereafter tolerated, the doctrine on which they rest should be carried no further than the letter of these adjudications require."

Greenleaf in his work on Evidence, Vol. 3, Sec. 90, classifies the different kinds of conspiracy, and under his fifth subdivision says:

> "Fifthly: To defraud and cheat the public, or whoever may be cheated; of this class are conspiracies to manufacture base and spurious goods and sell them as genuine, and conspiracies to raise the market prices by false news and artificial excitement, as already mentioned, and conspiracies to smuggle goods in fraud of the revenue, or to defraud traders of their goods by false pretenses and the like."

Every example of fraud punishable as criminal given

by Greenleaf, has as the ultimate object some crime recognized by the common law.

Wharton's Criminal Law, Sec. 2288, 7th Ed.:

"Undoubtedly, * * * it has been held that there are cases in which persons may be indicted for an offense committed in concert, when they would not be severally indictable for such an offense if committed individually. These decisions cannot now be shaken, except by the Courts who pronounced them; but any further extension of conspiracy in this direction should be resolutely opposed. A distressing uncertainty will oppress the law if the mere fact of concert in doing an indifferent act will be held to any greater extent than at present to make such act criminal. We all know what offenses are indictable, and if we do not, the knowledge is readily obtainable. Such offenses when not defined by statute, are limited by definitions which long process of judicial interpretation have hardened into shapes which are distinct, solid, public and permanent. * * * Nor can we continue to accept the reasons by which this indefinite extension of conspiracy has been justified. It used to be said that the combination of two or more persons to do an act invests it with a criminality which it does not otherwise possess. * * * Such as riot, etc. * * * 'But can this be predicted of combinations which the law does not in advance pronounce to be unlawful? One or two alternatives we must here accept. We must, with the old English Judges, look upon all voluntary combinations

as suspicious, and objects of judicial suppression, or we must declare that only such combinations are penally cognizable, as are declared beforehand to be unlawful.' "

One of the most comprehensive and instructive cases upon this subject, to be found in the books, is the case of Alderman vs. People, 4 Mich., 414, where the Court reviews at great length all of the common law cases of England and a large number of the cases reported in the early reports of this country. After reviewing the cases, the Court, at page 432, said:

"We will now proceed to examine the indictment in this case, in the light of the principles stated.

"The first count charges that the defendants 'did conspire, combine, confederate and agree, falsely and fraudulently, to cheat and defraud said persons and mercantile houses, and others doing business as aforesaid, etc., of divers large quantities of goods, and the prices and value thereof.' This charge is more general than that which has, in any case which has come under our notice, received the sanction of the English courts, more general than that in King vs. Gill, which has always been regarded as the extreme of laxity, as we have seen in Queen vs. Parker. The only words in the object stated, indicating an offense, are the words cheat and defraud. But these words, say the Courts in Com. vs. Eastman, Com. vs. Shedd, and State vs. Hewett, 'do not import any known common law offense. If punishable at all as a crime, it is only when the cheat *is*

affected by false tokens or false pretenses. To make such an object of conspiracy a criminal act, the combination or agreement must be to cheat and defraud in some of the modes made criminal by statute, and the indictment must contain allegations which show that the cheat and fraud agreed upon are embraced in such statute provisions, and that if perpetrated, would be punishable as a criminal offense."

Therefore, in going to the common law for a definition of the word "defraud," the indictment receives no assistance, but is there demonstrated to be essentially, and in this vital particular, wholly insufficient and does not charge defendants with any criminal offense.

This Court said, in United States vs. Cruikshank, 92 U. S., 542, 558, speaking through Chief Justice Waite:

> "And as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the Court may see that they are in fact illegal."

This was an indictment under the Act of May 31, 1870, which reads as follows: (Sec. 5508, R. S., U. S.)

> "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege," or
>
> "To injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," etc. 'shall be fined.' etc."

This is entirely different from Sec. 5440, R. S., U. S., and we contend that even under said Sec. 5440, "all cheating and defrauding has not been made criminal." As rightly said by the Court below:

> "Certainly the term 'defraud,' as here used, cannot be accepted in its broadest sense; and if so, it would cover constructive fraud known only in equity."

It was not the intention of Congress to embrace constructive fraud, and the Act cannot be construed to embrace any such frauds. The statute only includes those frauds known as a crime at common law, those involving moral turpitude and not merely a violation of an act which merely limits or prohibits.

In the case of Spring Company vs. Knowlton, 103 U. S., 49, this Court had occasion to pass upon the validity of a contract which was entered into in violation of a law of the State of New York prohibiting such contracts. Mr. Justice Wood, speaking for the Court, at page 57, said:

> "It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud."

In the Court below counsel for the Government relied upon the case of United States vs. Trinidad Coal & C. Co., 137 U. S., 160. That was a suit brought by the United States to recover coal lands located by the employes of the defendant company for the use and benefit of the company. The defendant demurred to the bill, which was sustained and the case brought to this Court. The de-

murrer admitted all facts well pleaded in the bill. The case was stated against the coal land entrymen and the corporation, as strongly as it could be made by counsel for the Government. It was alleged in the bill that the entrymen were employees of the defendant company and had theretofore exercised the right of making coal land entries. The Court held that the coal land laws could not be evaded in the manner set out in the bill. Mr. Justice Harlan, who wrote the opinion in that case, said at page 167:

> "There is, consequently, *in view of all the allegations of the bill,* no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because if the facts admitted by the demurrer had been set out in the papers filed in the land office, the patent sought to be canceled could not have been issued without violating the statute."

That was an equity suit, and all rules of equity were applied, not only to the acts of the defendant, but to the construction of the statute. The case at bar is not on the equity side of this Court. Wherein in the Trinidad case a liberal construction was applied, in the case at bar it must be a strict construction.

As said in the case of Ferrett vs. Atwill, 1 Blatch., 156, F. C., 4747:

> "Courts will not give equitable construction to a penal law, even for the purpose of embracing cases clearly within the mischief intended to be remedied."

In the case of United States vs. Sheldon, 2 Wheat., 119, the question whether the driving of fat oxen overland came within the statute prohibiting the transporting of naval or military stores intended for an enemy, was within the meaning of the statute of July 6, 1812. In holding that the driving of oxen did not come within the letter of the statute nor in the meaning of the words "transporting or otherwise," Justice Washington, writing the opinion of the Court held, that the words "or otherwise" had reference to the means of transportation used in the statute, and at page 121 said:

> "It may be admitted that the mischief is the same, whether the enemy be supplied with provisions in the one way or the other; *but this affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law.*"

To the same effect are the cases of,

> Myers vs. Foster, 6 Cowan, 567.
> Daggett vs. State, 4 Conn., 60.

District Judge Welborn of the Southern District of California, in the case of United States vs. Maid, 116 Fed., 650, said at page 652:

> "There is another aspect of the case, however, which furnishes as strong an argument against plaintiff's contention as the one just considered, and it is this: *a department regulation may have the force of law in a civil suit to determine property rights,* as in Cosmos Ex. Co. vs. Gray Eagle Oil Co. (112 Fed., 111), *and yet be*

ineffectual as the basis of a criminal prosecution.
U. S. vs. Eaton, (144 U. S., 677.)"

So that whatever may be the meaning of the word "defraud" as used in equity, it has a totally different and distinct meaning when the same word is used in a penal statute. Without being defined in the statute, when applied in a criminal case, it can go no further than that word meant at common law, to-wit: Those acts of a defendant which involve moral turpitude.

This is well illustrated in the case of United States vs. Stone, 135 Fed., 392, and Curley vs. United States, 130 Fed., 1.

It is not alleged anywhere in the indictment that the entrymen did not possess all of the qualifications required by the statute, nor is it alleged that any conveyance was made of the property prior to the issuance of the patent. The entrymen complied with every requirement of the statute, so that no fraud can be attached to their acts. In order to make a criminal offense there must be some fraud on the part of the entrymen.

The utmost that can be gatherd from the indictment is that the defendants sought to violate the limitation of the amount of acreage of coal lands. It is *malum prohibitum* not *"malum in se."* The act did not violate good morals; moral turpitude is not involved.

Spring Co. vs. Knowlton, 103 U. S., 49, 57.

There is this further difference between the acts complained of in this indictment and criminal fraud. The coal land laws place a limitation upon the amount of land which can be entered by one person or association of persons. If the statute has any effect at all, it acts upon the

offence, and not upon the person, by setting aside and vacating the entry as was done in the Trinidad case. Such statute will be construed liberally and not strictly as it would if acted upon the offender. The coal land laws in this respect are the same as the homestead law. The homestead law prescribes certain conditions or qualifications for an entryman, before he is allowed to enter a homestead. But if he does not possess these qualifications and makes an entry he has not committed a crime but his entry will be canceled.

In the case of Smith vs. Townsend, 148 U. S., 490, Smith, at the time of the opening of Oklahoma Territory, was a section hand in the employ of the Santa Fe Railroad, and was located at a station on said road within the Territory of Oklahoma. Upon the day of the opening Smith stepped from the right of way of the railroad upon the land and made his location. The question was whether this was a fraud upon the United States and whether there was any penal element in the acts of Congress with respect to the opening of the Oklahoma Territory, and the homestead laws. Mr. Justice Brewer, speaking for the Court, after quoting the act of Congress with respect to the opening of the Territory and the qualifications of entrymen, said at page 497:

> "It is urged that there is a penal element in each of these sections, and that therefore the statute must be strictly construed. This penal element is found in those clauses which debar one violating the provisions of the section from ever entering any of the lands, or acquiring any rights therein. But whatever of a penal element may be found in these parts of the sections, does not extend to those which are simply declaratory of

the conditions upon which entry and occupation may be made. Provisions of like character are frequently found in statutes and constitutions. *The general homestead laws give a right of homestead to persons possessing certain qualifications, but it is in no sense therefore, a penal statute as to those not possessing such qualifications.* The Constitution of the United States restricts the Presidency to natural born citizens, and such as are thirty-five years of age, and have been residents of the country for fourteen years, *but there is nothing in this of a penal nature as against those not possessed of these qualifications.* If Congress sees fit to impose a penalty on any individual who attempts to enter a homestead without possessing the statutory qualifications, the clause imposing the penalty may require a strict construction in a proceeding against the alleged wrong doer, but that does not give to the residue of the statute prescribing the qualifications, a penal character. That portion which describes the qualifications for entry is to be liberally construed, in order that no one be permitted to avail himself of the Bounty of Congress, unless evidently of the classes intended should enjoy that bounty. This idea is expressed in 1 Bl. Com., 88, in these words:

'Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule, most statutes against frauds being in their consequences penal. But this difference is here to be taken: Where the statute acts upon the offender, and inflicts a penalty as the pillory or a fine, it is then to be

taken strictly; but when the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally.' "

The coal laws, measured by this construction of the homestead law, are far short of anything of a "penal nature." If the law is violated, equity may interfere and cancel the entry, but the crminial law cannot take the person and punish him for doing an act not made criminal by an act of Congress, and never intended by Congress to be such.

(C) *The word "Fraud" has no definite meaning.*

In the case of Meldrum vs. Meldrum, 15 Colo., 478, 487, the Supreme Court of Colorado said that courts of equity decline to define "fraud." The Supreme Court of Colorado does not stand alone in its refusal to define fraud. All courts of equity, wherever the question has come up, have uniformly declined to give a definite meaning to the word "fraud." If we cannot find a definition of fraud in equity, where all liberality is allowed for the purpose of serving the ends of justice, how can an entryman seeking to avail himself of the privileges of the Federal Statutes, with respect to coal lands, say what acts of his with respect to the entry will or will not be fraudulent? The statute is silent, the chancellor will not assist him. Must he wait until some Court has sat in judgment upon his acts and defined the term for him? The Constitution says no. This Court has repeatedly said no.

In Sec. 352 of Eddy on Combinations, the author has this to say:

"The maxim that 'every man is charged with a knowledge of the law' means that he is

> charged with the knowledge of what the law designates as offenses. If the law fails to define an offense, the individual cannot be charged with knowing more than the law itself knows."

The law itself does not know what fraud is. The chancellor cannot define it. How can therefore a layman be charged with a knowledge of that which those learned in the law cannot, and Congress did not define? The word is in the statute without definition. There are degrees of fraud, some involving moral turpitude, some not.

There is nothing here to define or limit its meaning or the extent of its application. Does it involve moral turpitude or its mere constructive fraud sufficient upon which to charge a man with a felony? The defendants do not know, their counsel do not know, counsel for the Government in the Court below did not know.

It therefore lies in the breast of the Chancellor in an equity case to say what act of the party charged, will be sufficient to constitute a fraud. In a criminal case, under Sec. 5440, a party can never know until the moment of summing up the case by the Court, whether his act charged in the indictment, or proven at the trial, will or will not constitute such fraud as will be cognizable in a criminal prosecution. We say that it comes clearly and directly within the prohibition of the 6th Amendment to the Constitution which provides, among other things, "that the defendant shall be informed of the nature or cause of the accusation." To be charged with fraud, whether civil or criminal, does not inform the defendant of the nature of the accusation, because the fraud charged in a criminal indictment may never reach the degree of a crime. The common law, as well as all law, recognizes a criminal and

civil liability for fraud dependent in each case upon the particular facts. When a person obtains the money of another by false tokens, it may well be said a criminal liability would exist, because it is there defined by statute. Sec. 5440 does not undertake to define the fraud. Under the bankrupt laws of the United States it is held that the word "fraud" as there used means only positive fraud, the fraud in fact involving moral turpitude, or intentional wrong, as does embezzlement.

Forsythe vs. Vehmeyer, 177 U. S., 177, 181;
Bullis vs. O'Bierne, 195 U. S., 606, 620.

To compel a defendant to answer an indictment such as the one at bar, would be in effect to render the statute in its enforcement *ex post facto,* applying to a past act a construction of a statute not in existence at the time of the commission of the act. It does not inform the defendant what acts are prohibited by law, nor what acts are to be avoided. Further, the word "defraud" used in the statute is coupled with the word "offense," and under the maxim of *noscitur a sociis* the word "defraud" must be construed to mean something in the nature of an offense, recognized as such by some statute of the United States.

United States vs. Sheldon, 2 Wheat., 119, 121.

In the case of Barry vs. Snowden, 106 Fed., 571, it was held that under the statute the words "or other written evidence of indebtedness," following the words, "bill of exchange, acceptance, draft or promissory note," must be construed under the maxim *noscitur a sociis* as being any written evidence of indebtedness similar to a bill of exchange, promissory note, etc.

(D) *The Government in disposing of its public lands, acts as a private corporation as distinguished from its governmental purposes.*

A government as defined by Bouvier, is an institution or aggregate of institutions, by which society makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed upon the people forming that society by those who possess the power or authority of prescribing them. The sale of public lands, and all statutes passed in relation thereto, have nothing whatever to do with the making or enforcement of that rule of conduct or action necessary for men to live in a social state. It relates solely and exclusively, as said counsel for the government, to the disposition of a public trust. That the United States Government in dealing with its lands acts as a private corporation, or individual, see the following authorities:

Lee vs. Kauffman, 3 Hughes C. C., 36, F. C., 8191.

Elliott vs. Van Horst, 3 Wall. Jr., 299, 301, F. C., 4390.

Cotton vs. U. S., 11 How., 229, 231.

In the case of United States vs. Iron Silver Mining Co., 128 U. S., 673, Mr. Justice Field, at page 676 said, speaking of the United States Government in disposing of its public lands:

> "In this respect the United States as a landed proprietor stands upon the same footing with the private citizen."

Justice McKenna said, in the case of McKinley Mining Co. vs. Alaska Mining Co., 183 U. S., 563, at page 571:

> "That grantees of the public land taken by purchase, this Court, in Manuel vs. Wulff, left no doubt. It was said that when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession."

Justice Brewer said, in Parsons vs. Venzke, 164 U. S., 69, at page 92: "An entry is a contract." The Court said further, that like all contracts, it was voidable for fraud, but until voided it had the effect of an existing subsisting contract.

In Sturr vs. Beck, 133 U. S., 541, 548, Chief Justice Fuller said: "That upon entry, a right in favor of the entryman attached to the land, liable only to be defeated by failure on the part of the entryman to comply with subsequent conditions." "That right amounts to an equitable interest in land." The Chief Justice also speaks of the contract of purchase, the agreement of the Government to make proper conveyance; that the word "entry" means that act by which an individual acquires an inceptive right to a proportion of the unappropriated soil of the country by filing his claim. Therefore the word "entry" does not mean as sometimes construed, to embrace all of the acts of the entryman up to the time of the final payment for the land.

In People vs. Shearer, 30 Cal., 645, 658, the Court said:

> "The relation of the United States to the public lands since the admission of California

into the Union is simply proprietary—that of an owner of the lands, like any citizen who owns land, and not that of a municipal sovereignty." To the same effect are

State vs. Batchelder, 5 Minn., 178, 179.
Camp vs. Smith, 2 Minn., 155, 174.
Stockdale vs. Treas. Webster Co., 12 Ia., 536, 538.

In United States vs. Cornell, 2 Mason, 60, F. C., 14867, Mr. Justice Story said:

"The purchase of lands by the United States for public purposes within the territorial limits of a State, does not of itself oust the jurisdiction or sovereignty of such State over such lands so purchased."

"When, therefore, a purchase of land for any of these purposes is made by the National Government, and the State Legislature has given its consent to the purchase, the land so purchased, by the very terms of the Constitution, *ipso facto*, falls within the exclusive legislation of Congress, and the State jurisdiction is completely ousted."

Judge Sawyer, in the case of Woodruff vs. North Bloomfield Co., 18 Fed., 772, said:

"Thenceforth the only interest of the United States in the public lands was that of a proprietor, like that of any other proprietor, except that the State, under the express terms upon which it was admitted, could pass no laws to interfere with their primary disposal, and they were not subject

to taxation. In all other respects the United States stood upon the same footing as private owners of land."

This Court held in Pollard vs. Hagan, 3 How., 212, 224, that the National Government does not hold the public lands by municipal sovereignty it may be supposed to possess or have reserved by compact with the new State for that purpose.

There is no governmental function that is, or can be, exercised by the United States Government in the disposal of the public lands. A governmental function is the enactment and execution of rules of action. The disposal of public lands is the act of a trustee, a ministerial act. So that the utmost that can be said of a person who has violated the limitation of the land laws or a prohibition contained therein, is that he is guilty of a simple tort, not a criminal act; and until Congress has expressly said that a violation of some limitation or prohibition in the land laws shall be criminal, the Courts cannot say that it is.

THIRD.

THE WORDS "NOT EXCEEDING 160 ACRES TO SUCH INDIVIDUAL, OR 320 ACRES TO SUCH ASSOCIATION," AND THE WORDS, "ONLY ONE ENTRY BY THE SAME PERSON OR ASSOCIATION OF PERSONS," HELD TO BE WORDS OF LIMITATION AND NOT PROHIBITION.

In the case of Peterson, 6 L. D., 371, the Interior Department held that with respect to the acreage of the lands to be obtained under an entry, they were words of limitation.

The decision of Judge Sanborn, sitting for Judge Quarles, in the Eastern District of Wisconsin, in the Pereles case (157 Fed., 419), held that the words were words of limitation.

Words of limitation and words of prohibition are distinct, and have distinctly different meanings. The word "prohibition" means the act of forbidding or interdicting, prohibitory. (Anderson's Law Dictionary). The word "limitation" has reference to boundary, circumspection, restriction, curtailment. (Anderson's Law Dictionary.) Prohibition refers to the act, limitation to the land.

A statute containing simple words of limitation has never been construed as the basis, when violated, of a criminal prosecution, and no criminal action can or will lie therefor. A contract based upon a violation of a limitation is not even void; a contract based upon the violation of a prohibitory statute may or may not be void.

In the case of Gold Mining Co. vs. National Bank, 96 U. S., 640, this Court held that a contract in violation of Sec. 5200, R. S., U. S., for loaning more than one-tenth part of the capital stock of a bank to one individual, was not even void. A large number of cases in this Court are to the same effect.

FOURTH.

THE BREACH OF ANY STATUTE OR REGULATION OF THE DEPARTMENT RELATING TO COAL LANDS IS NOT A CRIME AND HAS NEVER BEEN SO CONSTRUED BY THE DEPARTMENT.

In re. Northern Pacific Coal Co., 7 L. D., 422, the Department held that an entry made in violation of a rule of the Department was simply void.

In 2 L. D., 728, the Department held that where the filing was assigned to a company, the land could be entered by the company as assignee.

Col. Vilas held in Gerard B. Allen, 8 L. D., 140, that a voidable entry may pass to another, in view of the price paid, and the fact that it could not be recovered back. In this case a party had made a preference entry, making affidavit that he had opened up a valuable coal mine upon the land, when in truth and in fact he had done no work upon the land, had discovered no coal, and there was no coal in the property. The party induced Allen to purchase his entry, and after spending a large amount of money and discovering no coal, filed an application in the local land office to have his money refunded on the ground that the land was not coal land. Though this was a direct and positive fraud on the Government, the entry being obtained by false affidavits and a fraudulent entry, the Secretary passed the land to patent. This decision has stood as the policy of the Department with respect to coal lands, unchallenged, for nearly twenty years.

Senator Teller, while Secretary of the Interior, in Larson vs. Weisbecker, 1 L. D., 409, held that a mortgage given by a pre-emptor of land was not in itself an alienation of the land, nor such an agreement as is prohibited by Sec. 2262, R. S., U. S. Senator Teller then held that no contract would be in violation of the public land laws, unless the contract at the time of the making of it would, *per se*, vest the title in some one else; that if the contract did not, *ab initio*, vest the title in some one other than the entryman, it was not a contract or agreement within the meaning of Sec. 2262, prohibiting the making of any contract with respect to the land. In other words, the Department since the publication of the first volume of the Land Decisions,

has recognized the rule that no contract or agreement which did not *per se* divest the title of the land from the entryman and vest it in the assignee was not in violation of the letter or spirit or policy of any public land law.

In the case of Durango Land & Coal Co., 18 L. D., 382, Secretary Smith held with respect to coal lands, that the sale absolute of a coal land entry after the actual execution of the final proof, but prior to its filing and the payment of the purchase money, does not warrant the conclusion that the entry was made for the use or benefit of another. The Secretary said, at page 385:

> "I find no authority, either statutory or jurisprudential, which warrants the holding that a sale by a claimant under the circumstances of the case at bar is conclusive evidence of fraud on his part. If his rights were fixed and vested, the inherent right of alienation had attached."

If prior to the final act of payment of the moneys and the filing of the final proof there was anything vested (and the Secretary there recognized that an interest had vested), what is there to prohibit the going of one step further back toward the initiation of the entry, and one moment subsequent to the filing of the application, for the entryman to execute a deed of absolute conveyance? We have seen that the Secretary can make no rules which will have the force and effect of law; and therefore whenever any right is initiated by any act of the entryman he then becomes vested with something which is alienable.

In the case of Donahue, 32 L. D., 349, Secretary Hitchcock held that a timber and stone entry under the Act of June 3, 1878, made in good faith, even though with the

expectation of profiting by a sale of the land, is not an entry for speculation within the meaning of the term as used in the Act. The Secretary said, at page 352, that "there is nothing in the Act—other than the word "speculation" itself—in any way indicating that Congress intended that no one should make such entries except lumber and timber dealers, or those intending themselves to cut and market the timber. If it was intended to so limit these entries, it is obvious that more apt words might have been chosen. It is not to be so limited, it is an absurdity to prohibit or forfeit an entry because the entryman contemplates profiting by a sale of the land. He would not make the entry and pay the money except from a motive in some way to profit himself, and if he does not intend himself to cut and market the timber, and is not by the statute to so intend, he perforce must intend to profit in the only way possible—namely, by a sale. This is the construction given to the Act by the Supreme Court and by the Department heretofore. Citing as his authority therefor U. S. vs. Budd, 144 U. S., 154-163; U. S. vs. Bailey, 17 L. D., 468-476; Hawley vs. Diller, 178 U. S., 476-480. In this case the entryman had prior to final entry agreed to sell the land for a certain price, and did after his entry convey the same.

Section 2, Act of June 3, 1878 (20 Stat., 89), (Timber and Stone Act), reads in part as follows:

> "That he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title he might acquire from the Government

of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the Register or the Receiver of the Land Office within the district where the land is situated."

This is the statute the Department had under consideration in the Donahue case.

In the case of Dawson vs. Higgins, 22 L. D., 544, the Department had under consideration a homestead entry where a contract had been entered into by the entryman with others prior to the final proof, whereby it was agreed that the entryman should receive from the contractor the sum of $20 per month until a hearing upon a contest against the entry was had; that if the entryman was successful he should pay to the contractor one-fourth the value of the land, or in event of his failure he should execute a deed for one-quarter of the land. The Secretary of the Interior held, page 458, that the agreement to sell is not an absolute agreement, and cannot in a suit to procure specific performance require or justify a decree for a conveyance of the land. This statement is made upon the theory that all question as to public policy is eliminated. It is an agreement which Higgins might at any time have avoided by the payment of the money consideration; that such an agreement did not operate as a disqualification of the entryman, and particularly a contract would not be regarded as a disqualification where it would not become effective before the date of entry.

This is in direct line and an affirmation of the decision of Senator Teller in the Larson-Weisbecker case, *supra*, to-wit: That a contract which of itself does not divest the title of the entryman, and only becomes effective after the

issuance of the patent, will be recognized and approved by the Department, even in a homestead entry, which is surrounded by all sorts of conditions and restrictions, making it as imperative as Congress could make it, to compel the entryman to reside upon the land, cultivate the same, and turn it to his own use and benefit, making the entry either void or voidable when these conditions are not in every particular, in good faith, carried out by the entryman. If this is the case of a homestead entry, how much more latitude should there be given in a coal entry, where, by the law, there is not a word or syllable in the nature of a condition precedent or subsequent imposed upon the entryman, whereby he binds himself in any manner whatever, to retain the title to his own use and benefit either prior to entry or subsequent thereto.

In 1882 while Senator Teller was Secretary of the Interior, the rules of the Land Department were codified and promulgated in pamphlet form. Under Rule 35 of the Department, so made and published, the claimant or entryman could, by affidavit, show that he was not personally acquainted with the character of the land, and was not in fact required to either go upon the land or investigate it, and could make all necessary affidavits required of an entryman, by an agent. Rule 37 provides *"assignments of the right to purchase will be recognized when properly executed."* This has been the rule with respect to coal entries ever since the law was enacted by Congress; never has been denied, but always enforced; assignments have always been recognized, until the 20th day of May, 1907, when the Commissioner of the Land Office added to the rules promulgated by him on April 12th of this year, denying the right of assignment subsequent to April 12, 1907, by what right or authority we need not now discuss.

Suffice it to say that Rule 37 as published in 1882, publicly announced, that a coal entryman could at any time sell his entry, and recognized the right of the assignee *in futuro* to perfect the entry by the payment of the stipulated price per acre. The entries and filings complained of in the case at bar were all made in 1904.

The Department having recognized assignments of coal land entires as being valid, and allowing the assignee to perfect the entry by the payment of the stipulated price per acre, and did so at the time of making these entries, how can it be said that because a party takes more than one assignment he is guilty of a crime? If one assignment is valid, there is no reason against the validity of two assignments, or a dozen assignments. Expressly recognizing one assignment is an express recognition of all assignments.

The coal law provides for two kinds of coal land entries. One is called the cash entry, the other the preference right of entry, or a right to pay the cash 14 months after settlement. Rule 37 applies to both cash and time rights of entry. This being the case, an assignment of the time right of entry is recognized by the rule, and has been so recognized ever since the existence of coal land laws in the United States. If by recognizing the right of entry by a time purchaser thereof, how can a Court say that the right of entry by a cash purchaser is not assignable, when the Department for thirty years and more has recognized the right of assignment by the time entryman? *A fortiori,* the right of entry of any man, under any form of entry whether by cash or otherwise, is assignable, and has been so recognized at all times by the Department of the Interior. The language of the rule unmistakably applies to both cash and time rights of purchase, and has been so construed by the Department by its acceptance of

all sorts and kinds of assignments of both kinds of entries. Having held out to the public since 1873 this unlimited right of assignment, practically inducing the public to go upon the public domain to there exercise the right of coal entry, what sort of crime is committed, if perchance Smith says to Jones, "I will go to Routt County and locate as a coal land entry, the N. E. ¼ of Sec. 10, and convey it to you if you will pay me the $10 per acre, my expenses to Routt County and $25." Has Smith committed a crime? Is it a conspiracy to defraud the United States under Sec. 5440 for Jones and Smith, under the recognized right as promulgated by the Department, to do exactly what Smith says to Jones he will do? If carried out, could they be convicted of anything at all? Such conduct is absolutely void of any criminal intent, and such was the ruling of Judge Sanborn in the Milwaukee case. (Pereles vs. Weil, 157 Fed., 419.)

Go one step further, and, as charged in the present indictment, the eleven defendants, together with the eight co-conspirators, and the "divers other persons to the grand jurors unknown," had gone to Routt County, with an agreement among themselves, and with a copy of the coal laws and regulations of the Interior Department in their pocket; not only that, but with every provision of the law and every rule of the Department indelibly stamped upon their brain; and on the way to Routt County the eleven defendants and the other eight conspirators with the "divers other persons," had entered into an agreement among themselves to each locate a quarter section of coal land, and when located and paid for to convey it to a corporation, to-wit, The Yampa Coal Company, exactly as charged in this indictment. Judge Sanborn of Milwaukee held that it was not a crime nor a conspiracy under Sec. 5440, and that the whole transaction was void of any criminal intent.

FIFTH.

THE COAL LAND LAW IS A PART OF THE MINERAL LAWS OF THE UNITED STATES, AND MUST BE CONSTRUED TOGETHER WITH ALL THE MINERAL LAWS.

This has been so held by the Department and this Court in: *In re.* Crowder, 30 L. D., 92-95; Coal Co. vs. U. S., 123 U. S., 307-324, 325; and Mullan vs. U. S., 118 U. S., 271, 277.

In that connection we would call the Court's attention to the fact that the laws regulating the location of placer claims limits the acreage to 20 acres to any one individual, or 160 acres to an association. Sec. 2231 R. S., U. S., provides among other things as follows:

> "And no such location shall include more than 20 acres for each individual claimant."

And Sec. 2320 with respect to lode claims provides among other things as follows:

> "A mining lode claim after the 10th day of May, 1872, whether located by one or more persons, may equal but shall not exceed one thousand, five hundred feet in length along the vein * * * no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface."

In the case of Durant vs. Corbin, 94 Fed., 382, 383, Judge Hanford said that it was contrary to public policy and to the provisions of Secs. 2330 and 2331 for one person to cover more than twenty acres of placer ground by

one location by the device of using the names of his employes and friends as locators. To the same effect is

Gird vs. Oil Co., 60 Fed., 531;
Mitchell vs. Cline, 84 Cal., 409, 415.

And this Court in Smelting Co. vs. Kemp, 104 U. S., 636, 651, practically recognizes the same rule. It is useless to say that this rule has ever been enforced by the Department of the Interior, by the Department of Justice, or any other department of the United States Government, and yet it is a part of the mineral land laws of the United States, with as well a defined public policy attached to it, as the Government is now seeking to attach to the coal land law. Then why at this time should the executive conscience be more sensitive toward the coal law than the placer law, both laws having the same limitations with respect to alienation and the size of the tenures?

The books are replete with decisions sustaining the "grubstake" contract; a contract entered into with the prospector, whereby the prospector agrees, before he goes into the hills, to convey an interest in every 20 acres of placer ground he may be able to find and locate, and the courts have always looked with favor upon, and have always upheld such contracts, even going to the extent of holding that such contracts, although they lie in parol and relate to the acquisition of real estate, are not within the statute of frauds.

Further, oil lands are declared by the Department and by Congress to be of such mineral character, that they are located, and title acquired, as placer claims. Oil is the product of coal measures. It bears the same relation to human industries as coal, and yet it is acquired as a placer claim, with every element and attribute of a placer

claim attached thereto, particularly the right of alienation before and after entry. Not only this, but asphaltum beds, and in fact all of the mineral oils of every class, character and description, are classified as placer claims, although the mineral oil may contain every element and character of native coal, except the character of solidity. Why coal should be more sacred than coal oil or asphaltum, or the dozen other kindred mineral oils, particularly when it is considered that the use to which asphaltum and these mineral oils are now put, include every use that was ever made of coal, is hard to comprehend. The statute does not do it, neither does the Department's rules. There is as great danger of monopolizing the mineral oils as there was of monopoly with respect to coal. Public policy would call as loudly for restrictions in the one case as in the other; yet the Department of the Interior has never made any restrictive rules. Congress has never legislated upon the subject with respect to mineral oils except that in the original placer act it put in the same limitation exactly as was placed in the coal land law.

The coal land laws being a part of the mineral laws, subject to the same interpretation with respect to public policy, being embraced under the same title and chapter in the Revised Statutes, how is it that the right of entry in one instance is held sacred and inalienable, and the other surrounded and upheld by the strong arm of equity? We say that by analogy these laws must receive the same interpretation as to the right of entry, the right of contract respecting same, and in the right of sale at any time before or after entry.

SIXTH.

CONTEMPORANEOUS CONSTRUCTION OF THE STATUTES.

It was held in the case of Gardner vs. Collins, 2 Peters, 58, by Justice Story, that a uniform course of professional opinion and practice which had long prevailed in the interpretation of a statute would be respected as almost of equal authority with that of a Court of last resort.

Again, Justice Story in United States vs. Bank, 6 Peters, 29, at page 39, said:

> "It is not unimportant to state that the construction which we have given to the term of the act is that which is understood to have been practically acted upon by the Government, as well as by individuals, ever since its enactment."

In Robertson vs. Bradbury, 132 U. S., 491, this Court held at page 493 that contemporaneous construction of a revenue law by the Treasury Department was entitled to weight in favor of importers.

Justice McLean said in United States vs. MacDaniel, 7 Peters, 1:

> "Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions."

Chief Justice Chase, in the case of United States vs. Gilmore, 8 Wall., 330, held that when a statute was construed by a department, and as so construed had continued for a long period of time, such construction was entitled

to great consideration, and would in general be adopted by the Court.

The construction given the Coal Land Statutes by the general public, by the land officers, by the Commissioner of the General Land Office and by the Secretary of the Interior, all recognize the acts of these defendants as legal. Granting that the defendants offered to pay all the expenses of the entrymen and also a bonus of $25 or $50, the Department and this Court recognize that as a legitimate transaction.

U. S. vs. The Detroit Timber & Lumber Co.,
200 U. S., 321.

We have, therefore, ever since the enactment of the coal land laws, a construction by the Department, whose duty it is to enforce these laws, and by the courts, which recognizes as legal and within the provisions of the statute every act complained of in the indictment. Thirty-five years of uniform construction and recognition. If contemporaneous construction has any bearing or any weight in the present case, it should be said without hesitation that none of the acts complained of are, in the remotest, criminal, nor have the statutes, the first element of a penal nature contained in any sentence thereof.

SEVENTH.

COURTS WILL FOLLOW THE CONSTRUCTION OF A LAW BY A DEPARTMENT OF THE GOVERNMENT, AND WHERE THE COURTS HAVE DONE SO FOR A LONG PERIOD IT PRACTICALLY BECOMES A RULE OF PROPERTY.

In United States vs. Moore, 95 U. S., 760, the Court said at page 763:

> "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. (Citing authorities.) The officers concerned are usually able men and masters of the subject; not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

In Heath vs. Wallace, 138 U. S., 573, at page 582, the Court said, with respect to the rulings of the Land Department:

> "Those adjudications, covering a consecutive period of nearly nine years, and so far as can be gathered from the printed reports of the decisions of that department relating to public lands, being the only ones bearing upon the subject, ought to be taken as showing conclusively the meaning attached to the phrase 'land subject to periodical overflow,' by the officers of the department whose duty it is, and has been, to administer the swamp land grant.
>
> "Moreover, if the question be considered in

a somewhat different light, viz., as the contemporaneous construction of a statute by those officers of the Government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this Court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."

To the same effect is

Sturr vs. Beck, 133 U. S., 541, 548;
Hewitt vs. Schultz, 180 U. S., 139, 157.

This last case stated that the Court would follow the construction of a statute placed thereon by the Department of the Interior.

It is needless to multiply these decisions. There are many more both in this Court and in the Circuit Courts of Appeal and the Circuit Courts.

EIGHTH.

UNLESS THERE IS EXPRESS LEGISLATION PROHIBITING ALIENATION, THUS MAKING THE VESTING OF THE TITLE CONTINGENT IN THAT PARTICULAR, THE ALIENATION OF ANY RIGHT IN PUBLIC LANDS CANNOT BE MADE THE BASIS OF EVEN A SUIT IN EQUITY, MUCH LESS THE BASIS OF A CRIMINAL PROSECUTION.

At the oral argument in the Court below there was some question as to what constituted an entry. An entry

is defined by this Court in Chotard vs. Pope, 12 Wheat., 586, 588, to be: "that act by which an individual acquires an inceptive right to the portion of the unappropriated soil of the country."

It may be said that Courts subsequent to that time have construed it somewhat differently, but in this contemporaneous construction the source and derivation of the word is given, and if there is any weight to contemporaneous construction it should receive the interpretation given in the Chotard case.

The statutes bearing upon the right of alienation of the rights acquired by entrymen under the various provisions of the public land laws have always been interpreted most liberally. One of the earlier cases decided by Justice Brewer, while Circuit Judge, is the case of Mullen vs. Wine, 26 Fed., 206, where he had under consideration the question of the right of a soldier to alienate his additional homestead entry acquired by virtue of Sec. 2306, an amendment to the original Soldiers' Homestead Act, which provided for residence of the soldier thereon, restricted the right of alienation and compelled the making of affidavits with respect thereto. The amendment was without restrictions as to residence or alienation. At page 207, in construing Sec. 2306 with respect to the restrictions and limitations contained in the original act, Justice Brewer said:

> "Now, this right to enter and locate 80 acres was a thing of value—something which enlarged the estate of the minors—was property. It was personal property going with them where they went; could be exercised and enjoyed anywhere; did not descend to the heir; was not attached to any particular tract of land; was therefore neither permanent, fixed nor immovable. It was a

mere right of selection and taking. Like all property, it was subject of sale. The right to sell property need not in terms be granted; *it exists if it is not in terms withheld. * * * When this right has been exercised, the location and entry made, who would doubt the right to sell the land? Yet why should the right to sell exist after entry and not before? Congress has placed no restriction—who may? * * * It places no restrictions on the donee, but leaves him to use the gift as he sees fit. Why may he not sell it? I see no satisfactory reason to the contrary."*

The coal land laws, as well as the soldiers' additional homestead law, is silent as to alienation, why then is not the right to enter coal land assignable? The right of entry of additional homestead of the soldier is assignable and his assignee can go upon the public domain and enter the land under the deed of assignment. Why not the person entitled to enter coal? So far as the law is concerned, it is similar in both cases. No restraint in either case; the soldier has the right in the one case; a person who has not exercised the right to enter coal land, is a citizen and twenty one years old, in the other. Both are valuable rights, is property. The right to enter coal land is personal property, can be enjoyed and exercised anywhere there is public coal lands; it does not descend to the heir; is not attached to any particular tract of land; it is not permanent, fixed nor immovable. It is a mere right of selecting and taking. Like all property, is subject of sale. The right of sale is not withheld. Congress has placed no restrictions upon it, why can it not be sold before entry as well as after entry?

Again, in Pourier vs. Barnes, 57 Fed., 956, Judge

Nelson, of Minnesota, had identically the same question before him, and announced the same conclusion as Justice Brewer, when construing the same section. At page 958, he said:

> "Counsel for defendant assert that the power of attorney to Boggs is in contravention of the laws of the United States and is against public policy. It is difficult to see how that can be in the absence of restrictive or prohibitory legislation. *An individual owning property, or a right to property, necessarily has the power of alienation; and public policy rather favors the theory that a man may do what he chooses with his own, unhampered by restrictions or hindrances.*"

This case squarely meets the issue tendered by Government counsel on the question of public policy. Public policy favors alienation rather than disfavors it.

This Court in Webster vs. Luther, 163 U. S., 331, speaking through Mr. Justice Harlan, at page 339, said:

> "If, then, Congress did not burden the right to additional lands with the condition that they should be contiguous to those originally entered, it would seem necessarily to follow that the grant of additional lands was without restrictions, and consequently, *there was no purpose to interfere with the disposition by the homesteader of such additional lands, or of his interest in them, in any mode he deemed proper, or that might be adopted in respect to other property owned by him.*"

On page 341, the Court expressly affirms the decision of Judge Nelson, in 57 Federal, and quotes from the opin-

ion of Judge Sanborn in affirming the Minnesota case, which is in part as follows:

> "On the other hand, the general rule of law which discourages all restraint upon alienation, the marked contrast between the purpose and the provisions of the grant of the right to the original homestead, and the purposes and provisions of the grant of the right to the additional land, and the history of the legislation which is codified in the existing homestead law, leave us without doubt that the assignment before entry of the right to this additional land granted by Section 2306 of the Revised Statutes contravenes no public policy of the nation, violates no statute, and is valid as against the assignor, his heirs and assigns."

In the same opinion, this Court also affirmed, by citation, the Mullen-Wine case, decided by Justice Brewer. Whether this additional right be called a gift or not, it is an additional right of entry, and being a right of entry, is in the same category as the right of entry under any other of the land laws.

This Court, in 1871, in the case of Myers vs. Croft, 13 Wall., 291, speaking of the right of alienation of lands entered under the Act of 1841, which Act provided:

> "and all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void,"

held, at page 296, that the restriction upon alienation only applied to the alienation prior to the exercise of that right;

that this right was valuable, and independently of legislation by Congress was assignable; that restrictions upon the power of alienation after the exercise of the right, would injure the pre-emptor, and would serve no important purpose of public policy. The same rule is laid down in

> Davenport vs. Lamb, 13 Wall., 418, 430,
> Lamb vs. Davenport, 18 Wall., 307, 314,

and all these cases are expressly reaffirmed by this Court in St. Louis Mining Co. vs. Montana Mining Co., 171 U. S., 650, 656, 7.

Coal lands being mineral lands within the term as used in the statutes regulating public lands (Mullan vs. U. S., 118 U. S., 271, 277), and the same regulation with respect to the number of acres allowed to be entered, the case of Smelting Co. vs. Kemp, 104 U. S., 636, 651, is directly in point upon the question of alienation. It is there said by Mr. Justice Field:

> "The Mining Act of May 10, 1872, c. 152, declared that the location of a placer claim subsequently made should not include more than twenty acres for each individual claimant. These are all the provisions touching the extent of locations of placer claims and they are re-enacted in the Revised Statutes, Secs. 2330, 2331. *A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. Every interest in lands is the subject of sale and transfer unless prohibited by statute, and no words allowing it are necessary.*"

In the case of United States vs. Budd, 144 U. S., 154, this Court had under consideration this same question of alienation with respect to entries made under the Timber and Stone Act (20 Stat., L. 89). Sec. 2 of the Act provides that the applicant must make oath:

> "That he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself."

At page 163, this Court held that all the Act denounced was a prior agreement, or the acting for another in the purchase; that it was not in violation of the Act to go into a district and give it out generally that a party was desirous of buying timber at an advance price over the Government price, and thus induce persons to enter land with the hope and expectation of selling the same; nor would such action be in contravention of any public policy, nor involve moral turpitude or fraud of any character. We invite a close consideration by the Court of this decision. We believe that it contains the Alpha and Omega of the entire situation; and in addition we invite the attention of the Court to the later case of Adams vs. Church, 193 U. S., 510, which arose under the timber culture act, in which case this Court said, at page 516:

> "But as the law does not require affidavit before final certificate that no interest in the land has been sold, we perceive no reason why such

> contract, as was found to exist by the Supreme Court of Oregon, would vitiate the agreement to convey after the certificate is granted and the patent issued."

The same rule would apply to an entry under the coal land law, and a contract would be held valid if made prior to the inception of any right thereunder, because in the coal law there is no statutory affidavit required at any time.

In Hafemann vs. Gross, 199 U. S., 342, a pre-emptor entered into an agreement with a party who had advanced money to pay one-fourth of the expenses in making final proof, to pay such party a proportion of the proceeds of the sale of the property after obtaining title from the Government.

Sec. 2262, R. S., provides that under the pre-emption laws the person making the entry shall make affidavit, among other things:

> "That he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use, and that he has not directly or indirectly made any agreement or contract in any way or manner with any person whatsoever by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself."

And yet this Court held (Mr. Justice Brewer writing the opinion) that this agreement was an enforcible agreement, and in rendering the decision cited the opinions of the Land Department to the effect that mortgages or deeds

of trust were not an alienation within the scope of the homestead statute or forbidden by the pre-emption law, especially where the money so obtained was for the purpose of completing the purchase of the land from the Government.

And again, along this same line this Court in the later case of United States vs. Detroit Lumber Co., 200 U. S., 321, held, at page 339, Justice Brewer rendering the opinion of the Court:

> "The statute provides that if an entry is wrongfully made (timber and stone entry), it may prior to patent, be set aside by the Land Department, the entryman forfeiting the money which he has paid. In other words, by the action of the Department, the equitable title is cancelled and restored to the Government. It then has both the full title to the land and the money which had been paid for it, *and this is the penalty which is imposed for the wrongful entry. Certainly when the Government retains the full price which it has placed upon the land, and also recovers the land itself, it is abundantly compensated for any wrong which has been attempted by the entryman.*"

This was said of an entry attempted to be set aside by a suit in equity of an entry made through the invitation of the grantor of the Detroit Lumber Company to persons living in the vicinity of its saw mill, in the State of Arkansas, giving out and informing them that the company would pay the expenses and all the costs of entry in patenting timber lands under the timber and stone act, and give the entrymen in addition the sum of $25, exactly as is charged to

have been done by the defendants in the cast at bar, except the so-called alleged agreement. The Timber and Stone Act requires an affidavit such as the Soldiers' Homestead Act, to which attention has hereinbefore been called, and restricts alienation and prohibits speculation in such entries. Yet if the forfeiture of the land and the money paid therefor is, as Justice Brewer says, the penalty imposed for the wrongful entry, and is a full compensation for the wrong done to the Government, how can the Government impose an additional penalty by way of criminal prosecution in a case where there is no restriction on alienation, where the statute from beginning to end does not require any sort of form of affidavit of any character whatever, unless it be to prove simply the entryman's qualifications, a violation of which affidavit as said in Smith vs. Townsend, 148 U. S., 497, has not the first penal element connected therewith?

In Williamson vs. United States, 207 U. S., 425, Mr. Justice White said, at page 462:

> "As then, there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to (Alienation of Entrymen under Stone and Timber Act), and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit and had full power to dispose *ad interim* of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant."

In the light of these cases, from the Myers-Croft case, decided in 1871, the Smelter Co. case in 1881, the Mullen case by Justice Brewer in 1886, the Pourier case in 1893,

the Webster-Luther case in 1895, the Adams-Church case in 1904, the Detroit Lumber case in 1905, the Williamson case in 1908; thirty-seven years of judicial approval of contracts respecting alienation of public land entries, without a suggestion of fraud, much less criminal liability, can this Court now say, under the mineral laws as they now stand on the statute books, that the alleged agreements mentioned in the indictment constitute in the remotest, a violation of any criminal law, particularly when this Court has said that the only penalty attached to the act of these defendants, if they be fraudulent, *is that of forfeiting the money which they have paid and forfeiting the land which they have sought to obtain.*

At the argument in Court below counsel for the Government did not undertake to answer any of these authorities.

Instead of restricting the right of alienation the last Act of Congress respecting the public coal lands was the Act of May 28, 1908. In that Act it enlarged the right of a person or association of persons, to take by purchase, or assignment to twenty-five hundred and sixty acres of contiguous land in the Territory of Alaska. So that the policy of Congress instead of curtailing the right, is enlarging it and extending it beyond the limitation prescribed in the General Statutes.

NINTH.

NO CRIME CHARGED IN SECOND COUNT OF THE INDICTMENT.

No crime is charged in count No. two of the indictment, either under Sec. 4746 or amendment thereto, for the reason that said section and the amendment have refer-

ence solely and alone to pension matters. The act of 1898, amending this section cannot be enlarged to apply to anything outside of the original section unless it is expressly stated either in the enacting clause or the wording of the amendment itself. The language of the amendment applies exclusively to pension matters.

At the time the amendment was adopted it was considered by Congress to apply solely to pension matters, and was prepared by the Pension Department. Sec. 5418 R. S., U. S., is a general act providing a penalty for the making or filing of false, fraudulent or counterfeit paper, affidavit or other matter, with any officer of the United States for the purpose of defrauding the United States. This being a general act covering the subject it cannot be said that Congress intended to alter a purely pension statute so as to cover general matters.

This Court in Edgington vs. United States, 164 U. S., 361, held that Sec. 4746 related exclusively to matters within the jurisdiction of the Commissioner of Pensions, and to nothing else. To the same effect is United States vs. Wood, 127 Fed., 171.

In the case of Pooler vs. United States, 127 Fed., 509, the Circuit Court of Appeals, after reviewing and commenting upon the insertions made by the amendment of 1898, said at page 514:

> "These (insertions) so far depart from the purpose of Sec. 4746, as described in Edgington vs. United States, that they do not relate to the procuring of a crime by another person; and they impose a penalty directly on the individual himself who prepares the false or fraudulent paper, or assists therein."

If the amendment be ambiguous or unintelligible, or if any doubt exists as to its application, the Court is at liberty to consult the proceedings of Congress in order to determine the evil sought to be remedied by the enactment of the statute.

Am. Net Co. vs. Worthington, 141 U. S., 468, 474.

Holy Trinity Church vs. U. S., 143 U. S., 457, 462.

Hepburn vs. Griswold, 8 Wall, 603.

In the Congressional Record, Vol. 31, Part 4, pp. 3025-4032, 55th Congress, 2nd Session (pp. 3866-3867), will be found the following:

"FRAUDULENT EXECUTION OF PAPERS CONCERNING PENSION CLAIMS.

"Mr. Henderson: Mr. Speaker, I now call up the bill (H. R. 6160) to amend Sec. 4746 of the Revised Statutes of the United States, and I yield to the gentleman from New York (Mr. Alexander), who reported the bill.

"The bill was read as follows:

"Be it enacted, etc., That Sec. 4746 of the Revised Statutes of the United States is hereby amended to read as follows:

"That every person who knowingly or wilfully makes or aids, or assists in the making, or in any wise procures the making or presentation of any false or fraudulent affidavit, declaration, certificate, or paper, or writing purporting to be such, concerning any claim for pension or pay-

ment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or of the Secretary of the Interior, or who knowingly or wilfully makes or causes to be made, or aids or assists in the making, or presents or causes to be presented at any pension agency any power of attorney or other paper required as a voucher in drawing a pension, which paper bears a date subsequent to that upon which it was actually signed or acknowledged by the pensioner, and every person before whom any declaration, affidavit, voucher or other paper or writing to be used in aid of the prosecution of any claim for pension or bounty land or payment thereof, purports to have been executed, who shall knowingly certify that the declarant, affiant, or witness named in such declaration, affidavit, voucher, or other paper or writing personally appeared before him and was sworn thereto, when in fact such declarant, affiant or witness did not personally appear before him or was not sworn thereto, shall be punished by a fine not exceeding $500, or by imprisonment for a term of not less than one year or more than five years."

"The amendments recommended by the committee were read as follows:

"In line 9, page 1, after the word "certificate" insert the word "voucher."

In lines 13 and 14, page 2, after the word "thereto" insert "acknowledged the execution thereof."

In line 16, page 2, after the word "thereto" insert the words "or did not acknowledge the execution thereof."

In line 18, page 2, strike out the words "less than one year or."

"Mr. Alexander: *Mr. Speaker, this bill is suggested by the Commissioner of Pensions,* and seeks only to bring within the penal provisions those persons who certify that others have come before them and are identified and have executed the pension papers, when in fact they have not appeared before the notary or the person so certifying."

"Mr. Talbert: I should like to ask the gentleman if this is the unanimous report of the committee?

"Mr Alexander: It is.

"Mr. Talbert: *Has the Committee come into possession of the evidence of considerable fraud upon the Pension Department and is that the reason they have brought this bill forward?*

"Mr. Alexander: *Yes, the Commissioner of Pensions has sent a letter which is embodied in the report of the Committee accompanying the bill.* He also sent a subsequent letter.

* * *

"Mr. Alexander: This bill has to do entirely with notaries public. I will read one or two instances from the Commissioner's letter, which I think will satisfy the gentleman:

"Jesse C. Hansee, an attorney who had one office at Hoboken, N. J., and another office at Ellenville, N. Y., caused papers to be signed in blank within the State of New Jersey and subsequently taken to New York where notaries in his employ filled out the papers and attached

their jurats thereto. Subsequently Mr. Hansee abandoned his Ellenville office and caused notaries employed by him in the city of Hoboken to resort to identically the same practice. *George F. Seymour, one of the notaries so employed by him, was tried in a number of cases and acquitted, as it was, in fact, held by the trial judge that neither Section 4746, as it now exists,* nor any other Federal Statute, was applicable to the case, though the judge stated that he was satisfied from the evidence adduced that the State law had been violated by the notary in falsely certifying to the papers.

"The same series of offenses were committed in various other sections of the country; notary at Norfolk, Va.; Nashville, Tenn.; Chattanooga, Tenn.; Amelia, Ohio; Pensacola, Fla.; Mobile, Ala.; etc.

"That is all the amendment seeks to do—to bring within the penal statute those persons who certify that people came before them and acknowledged the papers, when, in fact, they never came before them, but were absent at the time.

* * *

"The amendments recommended by the Committee were agreed to.

"The bill as amended was ordered to be engrossed and read a third time, and being engrossed it was read a third time and passed."

Also in the Congressional Record, Vol. 31, Part 7, pp. 5937-6808, 55th Congress, 2nd Session, (pp. 6603-6604) will be found the following:

"FALSE AFFIDAVITS, ETC.

"Mr. Hoar: I am directed by the Committee on Judiciary to whom was referred the bill (H. R. 6160), to amend Section 4746 of the Revised Statutes of the United States, to report favorably without amendment. It is a House bill which I should also like to put on its passage. It will take but a moment.

"The Vice-President: The bill will be read by the Secretary.

"The Secretary read the bill as follows:

(Here follows the bill as it came from the House.)

"Mr. Hoar: If I may make one brief statement about this bill, I do not myself think it is necessary; but the House of Representatives thinks it is necessary, the Department of the Interior thinks it is necessary, *and the Pension Office thinks it is necessary.* It was drawn in the Department. Under the existing law the making of blank affidavits or blank certificates or jurats to be filled up fraudulently, which is a common practice, can only be punished where it is proved to be done to defraud the United States. That has to be alleged and proved. The law officers of the Department think that, if a pension agent, or anybody having a transaction with that Department, has on hand a lot of blank jurats or blank certificates, blank testimony signed by witnesses in blank to be filled up afterwards, and if they are filled up in aid of an honest claim against the Government, that is not doing it to defraud

the United States. I do not think so. I think that it is a fraud on the United States to impose on its officers as a genuine affidavit or a genuine certificate of the facts contained in it, a paper which was signed in blank by the man who signed it and filled up afterwards. But if the practice is otherwise, if the Department think it is otherwise, it is better to make it clear; and accordingly the Judiciary Committee unanimously recommend the passage of the bill.

"Mr. Cockrell: And this bill covers that kind of an affidavit?

"Mr. Hoar: This bill is to cover that.

"The Vice-President: Is there objection to the present consideration of the bill?

"There being no objection the bill was considered as in Committee of the Whole.

"The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed."

In Holy Trinity Church vs. United States, 143 U. S., 457, Mr. Justice Brewer, writing the opinion of the Court, said at page 463:

> "Again, another guide to the meaning of a statute is found in the *evil which it is designed to remedy;* and this the Court properly looks at contemporaneous events, *the situation as it existed, and as it was pressed upon the attention of the legislative body.*"

Looking to the records of Congress, both in the House and the Senate, it is found that notaries falsely

certifying to affidavits to be filed in the Pension Department, under the then existing law, could not be punished and the Pension Department itself prepared the law, procured its introduction in Congress, and as the Congressional Records show, was passed solely upon the recommendation of the Pension Department. It remedied evils then existing in the enforcement of the pension laws and was passed solely to protect the Pension Department. The Congressional Records disclose the source of the bill, the evil to be remedied. The source of the bill was the Pension Department. The evil existed solely with Pension matters.

Again, the title of the original act is:

> "An Act to Revise, Consolidate and Amend the Laws Relating to Pensions," (17 St. L., 566-577.)

and the title to the amendment is simply:

> "An Act to Amend Sec. 4746."

So that, referring to the titles, we have simply a pension statute. Under the pension laws and rules of practice of the Pension Department, appeals may be taken from the decision of the Commissioner of Pensions to the Secretary of the Interior; and upon such appeals additional affidavits, additional evidence and additional briefs may be filed. That was the point sought to be covered by Congress in the amendment; that is, to cover any affidavits or other false and fraudulent papers filed with the Secretary of the Interior upon an appeal of a pension case to him.

The words "or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or the Secretary of the Interior," under the rule of *ejusdem*

generis the "other matter" must be of a like or similar character, and pertaining to matters within the jurisdiction of the Commissioner of Pensions, to-wit: concerning "any claim for pension or payment thereof." If given its broadest meaning, the statute would be unlimited in its scope and purpose. This was not the intention of Congress, as a perusal of the whole Act as amended would prevent any such unlimited construction.

United States vs. Sheldon, 2 Wheat., 119, 121.

As is said by this Court in McKee vs. United States, 164 U. S., 287, 293:

> "But we think a perusal of the whole Act prevents our giving this unlimited construction, because to do so would conflict with what we think was the intention of Congress gathered from the provisions of the whole act. Under such circumstances it is not only the right but it is the plain duty of the Court to limit by a proper construction the otherwise boundless application of the general language used in the statutes."

In United States vs. Beach, 71 Fed., 160, Judge Hallett, then District Judge for the District of Colorado, held that the words: "Any scheme or artifice to defraud," as used in Sec. 5480, R. S., U. S., "must be limited to such schemes and artifices as are *ejusdem generis* with those named."

In United States vs. Caldwell, 19 Wall., 264, 268, it is held that the words: "Any posts, depots or stations," covered only military posts or stations, because of its context in the contract, and did not include railway stations.

In State vs. Summer, 10 Vt., 587, it was held that the words: "Other fraudulent, swindling and deceitful practice" referred only to such practices as were specifically mentioned in the statute.

In Edson vs. Hayden, 20 Wis., 682, the Court held that the words "drunkenness and profligacy" in a statute "must be limited to vices *ejusdem generis* or conduct tending to the same results."

In American, Etc., Co. vs. Virginia, Etc., Co., 91 Va., 272, 280, it was held that the words "or any other matter" used in a statute must be construed as relating to matters of similar nature with those specifically mentioned.

This Court in United States vs. Bitty, 208 U. S., 393, 402, held that the words: "Or for any other immoral purpose," following the words "for the purpose of prostitution,"

> "must be only of the same general class or kind as the particular purpose specified in the same clause of the statute."

That the word "prostitution" would include any immoral purpose, and therefore concubinage was within the statute.

With these rules of construction, together with the views of Congress when they passed the Act, and the interpretation placed upon the amendment by the Courts, it cannot be well said that the words of the statute "or pertaining to any other matter," can be said to relate to anything outside of matters pertaining to pensions or the payment thereof, or matters directly within the authority of the Pension Department, whether it be a pension, a claim for bounty land, or the payment of a pension or other matter in relation thereto.

JURISDICTION OF THE SECRETARY.

It was contended in the Court below, by counsel for the Government, that the acts complained of in count No. two of the indictment came within the *jurisdiction* of the Secretary of the Interior; that all matters pertaining to public lands were in his department, and therefore the Secretary of the Interior had *jurisdiction* within the meaning of the statute of all matters pertaining to the entry and patenting of the public lands.

A reference to the Acts of Congress with respect to the office of the Secretary of the Interior and Register and Receiver and their various powers and duties, will show that it was never the intention of Congress when it used the word "jurisdiction" in the amendment, to use it in the sense of governmental power over the thing or in the sense of hearing and determining.

Sec. 441, R. S., provides that the Secretary of the Interior has charge of the supervision of public business relating to the following subjects, among which are:

> "*Second:* Public lands, including mines."
> "*Fourth:* Pension and bounty lands."

Sec. 446, R. S., provides there shall be in the Department of the Interior a Commissioner of the General Land Office who shall be appointed by the President with the advice and consent of the Senate.

Secs. 447, 448 and 449, R. S., provide for the appointment of a Recorder by the President, a Principal Clerk of Public Lands, a Principal Clerk of Private Lands, a Principal Clerk of Surveys, all to be appointed by the President with the advice and consent of the Senate.

Sec. 457 R. S. provides that the Secretary of the Interior shall issue all land warrants for military services.

Sec. 2234 R. S. provides for the appointment by the President by and with the advice and consent of the Senate of a Register of the Land Office and a Receiver of public moneys for each land district established by law.

Sec. 2244 R. S. provides that the terms of Registers and Receivers shall be four years.

Sec. 2245 R. S. provides that Receivers of the land offices shall make monthly returns of all public moneys to the *Secretary of the Treasury,* and not to the Secretary of the Interior.

Registers and Receivers are required to give bond and to reside at the place of location of their offices. Secs. 2235 and 2236 R. S.

Sec. 2246 R. S. provides that the Register or Receiver are authorized to administer any oath required by law, or the instructions of the General Land Office, in connection with the entry and purchase of lands.

Sec. 2247 R. S. provides that all applications to enter lands shall be made to the Register, and provides a penalty for his refusal to permit any such entry.

Sec. 2259 R. S. provides that all pre-emption entries shall be made in the office of the Register of the local land office.

Sec. 2263 R. S. provides that proof in pre-emption entries shall be made "to the satisfaction of the Register and Receiver."

The succeeding several sections provide for proceedings before the Register and Receiver respecting all questions as to the right of pre-emption arising between different settlers, and the same shall be *determined by the Register and Receiver,* not by the Secretary of the Interior or even the Commissioner of the General Land Office.

Sec. 2273 R. S. provides that all questions of the right of pre-emption arising between different settlers shall be determined by the Register and Receiver of the district within which the land is situated; *and appeals from the decision of the district officers in cases of contest for the right of pre-emption shall be made to the Commissioner of the General Land Office whose decison shall be final unless an appeal therefrom be taken to the Secretary of the Interior.*

Sec. 2290 R. S. provides that homestead entries shall be made and the application therefor filed with the Register and Receiver of the local land office.

Sec. 2365 R. S. provides for the *settlement by the Register* of any conflicting claim between two applicants to purchase at any private sale of public lands.

Sec. 2483 R. S. provides that patents to public lands shall be issued by the President of the United States, not by the Secretary of the Interior.

Sec. 2347 R. S. provides that applications to enter coal lands shall be made to the *Register of the proper land office.*

Sec. 2351 R. S. provides with respect to coal and mineral laws that "the Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections."

The Department by circular issued from the General Land Office in 1904 at pages 86, 87 and 88, provides for *appeals from the Register and Receiver* to the *General Land Office on any questions relating to the disposal of public land,* and from the *decision* of the *Commissioner of the General Land Office* to the *Secretary of the Interior.*

All of the rules of the Department and the practice

before the Department recognize the power of the Register and Receiver in the first instance to enter a valid binding judgment, and in default of appeal therefrom to the Commissioner of the General Land Office, such judgment of the Register and Receiver is final and as binding as a decree of a Court of competent jurisdiction.

This Court in several cases has held that the Register and Receiver of the local land office when sitting to hear and determine any question respecting the sale and disposal of public lands is a quasi-judicial tribunal.

> Caha vs. U. S., 152 U. S., 211, 217;
> Orchard vs. Alexander, 157 U. S., 372, 383.

This Court in Gonzales vs. French, 164 U. S., 338, in passing upon the authority of the Register and Receiver with respect to pre-emption claims, Justice Shiras, writing the opinion, said at page 345:

> "The Register and Receiver were therefore warranted in rejectiong the claim of the plaintiff in error. And at any rate as she did not APPEAL from their decision to the Commissioner of the General Land Office, she must be deemed to have acquiesced therein, *and is concluded thereby so long as it remains unreversed.*" (Citing Wilcox vs. Jackson, 13 Pet., 498, 511.)

In the case cited in the opinion it was said by Justice Barbour at page 511:

> "The acts of Congress have given to the Registers and Receivers of land offices the power of deciding upon claims to the right of pre-emption; *that upon these questions they act judicial-*

ly; that no appeal having been given from their decision it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction where no appellate tribunal is created; and even when there is such an appellate power the judgment is conclusive when it only comes collaterally into question so long as it is unreversed."

In Orchard vs. Alexander, 157 U.S., 372, Mr. Justice Brewer, writing the opinion, said at page 385:

"In this connection reference may be made to section 2273, which provides for a contest between two parties claiming the right of pre-emption. Such a contest is to be heard *in the first instance by the local land officers, subject by express declaration to the right of appeal to the Commissioner, and subsequently to the Secretary of the Interior.* In other words, when any individual contests the validity of the action of the local land officers there is confessedly the right of appeal."

In Guaranty Savings Bank vs. Bladow, 176 U. S., 448, Mr. Justice Peckham, at page 451, said:

"Although the power to review and to cancel is not arbitrary or unlimited, and does not prevent judicial inquiry in regard to its exercise, in some appropriate form, *yet it is unquestionable that the power of reviewing and setting aside*

the action of the local land officers does exist in the General Land Department when a proper appeal is taken."

In other words, the case must reach the General Land Office by appeal the same as a suit at law is taken by appeal from one court to another. It is a general rule that when Congress has confided to a special tribunal authority to hear and determine certain matters arising in the course of its duties, its decision is conclusive upon all parties thereto, and is the equivalent of a judgment at law.

Johnson vs. Towsley, 13 Wall., 72, 83;
French vs. Fyan, 93 U. S., 169, 171;
Steel vs. Smelting Co., 106 U. S., 447, 457;
Barden vs. No. Pac. Ry. Co., 154 U. S., 288, 327;
Marquez vs. Frisbie, 101 U. S., 473, 476;
Vance vs. Burbank, 101 U. S., 514, 519;
Heath vs. Wallace, 138 U. S., 573, 585;
Baldwin vs. Stark, 107 U. S., 463, 465;
Craig vs. Leitendorfer, 123 U. S., 189, 212;
Iron Silver M. Co. vs. Campbell, 135 U. S., 286, 292;
U. S. vs. Budd, 144 U. S., 154, 168;
Gonzales vs. French, 164 U. S., 338, 342;
Sanford vs. Sanford, 139 U. S., 642, 647;
Nesqually vs. Gibbon, 158 U. S., 155, 166;
Moss vs. Dowman, 176 U. S., 413, 415;
Gardner vs. Bonestell, 180 U. S., 362, 370;
Clark vs. Herrington, 186 U. S., 206, 210;
Johnson vs. Drew, 171 U. S., 93, 99;
Carr vs. Fife, 156 U. S., 494, 500.

In Caha vs. U. S., 152 U. S., 211, the Court said, at page 218:

> "Clearly then within the scope of section 5392 (the general perjury statute) *the local land officers in hearing and deciding upon a contest with respect to a homestead entry constituted a competent tribunal,* and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered."

Nowhere do we find either in the laws of Congress, in the rules of the Department, or any judicial decision respecting the powers of the Interior Department, any authority given to the Secretary of the Interior to pass upon any question respecting the entry of land, the qualifications of the entryman, or any contest between different claimants to the same lands, except it be after a decision thereon first by the Register and Receiver, second by the Commissioner of the General Land Office, and then by a direct appeal to the Secretary of the Interior. All authority to hear and determine questions in the first instance is vested in the Register and Receiver of the local land offices. Their appointment is provided for, not by the Secretary of the Interior but by the President. They are not employes of the Department of the Interior, but officers with duties prescribed by statute. The money received by the Receiver of the land office is not accounted for to the Secretary of the Interior, but to the Treasurer of the United States. In the indictment it is nowhere alleged that any of the matters concerning the entries complained of were ever pending before the Secretary, or that any of the affidavits or other papers ever reached that office by

appeal or otherwise or at all. The matter was in the local land office. It there remained and was there determined. The allegation is that these various papers were presented to the local land office at Glenwood Springs, Colorado, (Record pp. 20 and succeeding overt acts) and the matter was not within the jurisdiction of the Secretary of the Interior. The word "jurisdiction" as applied in the statute has a totally different meaning.

In McNitt vs. Turner, 16 Wall., 352, the Court said at page 366:

> "Jurisdiction is authority to hear and determine."

In Daniels vs. Tearney, 102 U. S., 415, 418, this Court again said:

> "Jurisdiction is only 'the right to hear and determine'. The result of its exercise is the judgment of the Court."

In Simmons vs. Saul, 138 U. S., 439, Mr. Justice Lamar, in writing the opinion, at page 454, quotes with approval the definition of jurisdiction used by Mr. Justice Swayne in McNitt vs. Turner, *supra*, to-wit:

> "'Jurisdiction is authority to hear and determine.' It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice* can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error."

There is no fact stated in count No. two to support the conclusion that the matter was within the jurisdiction of the Secretary. As the law provides for determination of the question by the local land office, and as the courts have held that that determination is final and conclusive upon all parties unless an appeal is taken, and no appeal being in this case alleged, there was nothing within the jurisdiction of the Secretary of the Interior to hear or determine. The case never was there. The only method of invoking the jurisdiction of the Secretary of the Interior in respect to the matters complained of is by a direct appeal to that officer, through an appeal from a decision of the Commissioner of the General Land Office, and this must be stated by direct allegation. The jurisdiction of the Secretary must be invoked the same as the jurisdiction of an Appellate Court. It will not be inferred or implied. The matter is exactly similar to the situation of the Federal Courts. In a proper case an appeal will lie from a decision of a Circuit Court to the Circuit Court of Appeals, and from the Circuit Court of Appeals to this Court; but because a case may be ultimately brought to this Court for final hearing, it cannot be said that a pleading filed in the Circuit Court is within the jurisdiction of this Court, notwithstanding the matter may ultimately be brought by direct proceedings to this Court. No more was the indictment in this case, when filed in the Court below, within the jurisdiction of this Court, because the case has finally reached here by writ of error.

The reading of the original section and the amendment, will clearly show the construction to be placed upon the statute as amended, and will inevitably limit its application to matters pertaining to pensions, or bounty lands, or payments therefor. Nothing else can be made

of the statute. The authorities cited in the former part of this brief with respect to the construction of Sec. 5440 apply with equal force to the construction of this section. The amendment is governed by the rule, to-wit: While general terms are to be given their natural and full signification, yet where they follow specific words they take their meaning from the latter, and are presumed to embrace only things or persons of the kind designated by them.

Therefore, when the statute as amended provides that any person making or presenting any false or fraudulent affidavit, declaration, certificate, voucher, etc., concerning any claim for pension, or payment thereof, or "pertaining to any *other matter* within the jurisdiction of the Commissioner of Pensions, or the Secretary of the Interior," the words "other matter" will infer enlarged duties and powers, but the rule of construction to be placed thereon will limit the crime with respect to anything filed in the office of the Secretary of the Interior to like papers which have been filed with the Commissioner of Pensions, to-wit: Matters respecting pensions or bounty lands. On the other hand, every specific document mentioned in the statute is limited by the words following, "concerning any claim for pension or payment thereof," and those words will govern by the rule *noscitur a sociis* the words "or pertaining to any other matter." And therefore, the "other matter" must be some other sort of paper relating to a pension matter or the payment thereof.

Therefore, we say, and say with confidence, that neither the section as it originally stood, nor the amendment, has any reference of any kind whatever to the alleged facts set out in count No. two.

Counsel for the Government conceded in the Court

below that the alleged facts in count No. two do not state a crime under Sec. 4746, and announced to the Court that it was their belief that a crime had been stated under Sec. 5421, at the same time stating to the Court that there are other sections in the statute to which possibly the alleged facts might apply, and at the close of the oral argument Government counsel were still hunting for the section upon which they proposed to stand.

Admitting everything pleaded in the second count to be true, yet it does not state any offense against the United States. The acts charged were the making of false and fraudulent affidavits and powers of attorney; and yet it is held in United States vs. Manion, 44 Fed., 800, that there is no federal law permitting affidavits of the character charged in count No. two to be taken before a notary public; and if so taken they cannot be made the basis of perjury under Sec. 5392. If they cannot be made the basis of perjury, how can a paper of that character be made the basis of any other crime. It is needless to quote from the above case more than this:

> "Sec. 2347, *et seq.*, Rev. St., relating to sale of coal lands, does not in terms prescribe or authorize such an affidavit as the one now under consideration, nor confer any authority upon notaries public; and no act of Congress has been called to my attention which does authorize the oath, or vest in such officer the power to administer it, and according to my understanding of the decisions of Supreme Court of the United States in the cases of U. S. vs. Curtis, 107 U. S., 671; U. S. vs. Hall, 131 U. S., 50; U. S. vs. Perrin, 131 U. S., 55; and U. S. vs. Reilly, 131 U. S., 58, for want of statutory provisions cover-

ing these points, the case is not within Sec. 5392."

The cases cited support the decision to the fullest extent.

Let us quote one word further from the Manion case:

> "Perjury can only be assigned upon an oath authorized by a law of the United States. Law, according to the most familiar definition of that term, is a rule prescribed by the supreme power of the nation. Now, the Commissioner of the General Land Office is not the supreme power of the United States. He does not create the laws of the United States, and he cannot be endowed with the power to do so while the present Constitution is upheld."

In the overt acts charged in count No. two upon which all of this perjury is assigned, we find that they are in respect to powers of attorney and the acknowledgement thereof. How a perjured affidavit can be predicated upon an ordinary acknowledgement of one's signature to a power of attorney is beyond the comprehension of the writers of this brief.

TENTH.

SEC. 4746 REVISED STATUTES NO LONGER IN FORCE.

Sec. 4746 R. S. upon which count No. two of the indictment is predicated, is no longer in force as Sec. 4746. Our contention is that it having been amended in 1898

the amendment is the only act in force, it superceding the original section; and that in pleading a violation of the provisions of the amendment it is not sufficient to plead a violation of Sec. 4746 R. S., U. S., and the Government will not be allowed to supplement the plea by a reference now to the amendment of 1898.

In Dimpfel vs. Beam, 91 Pac., 1107, 1108, decided October 7, 1907, by the Supreme Court of California, it was said:

> "It is firmly settled that where a section in an existing law is amended in the mode prescribed by the Constitution, it ceases to exist, and the section as amended supersedes the original."

A reference now to the amendment of 1898, to supply the defect in this count cannot be made, because of the provisions of the 6th Amendment to the Federal Constitution providing that accused shall be informed of the nature and cause of the accusation. The defendants are by the indictment informed and accused of violating the provisions of Sec. 4746 as it stands in the Revised Statutes of 1878 and not of the provisions of the amendment of 1898.

ELEVENTH.

THE GOVERNMENT HAVING ALLEGED IN THE BODY OF THE SECOND COUNT OF THE INDICTMENT THAT THE ACTS WERE IN VIOLATION OF SEC. 4746 R. S., U. S., CANNOT NOW ASSERT THAT THEY WERE IN VIOLATION OF ANY OTHER SECTION.

It was sought in the Court below by counsel for the Government, to found the second count upon section 5421. That section has, for more than 50 years, been construed to mean, and to apply only, to instruments altered or forged for the purpose of obtaining *moneys* from the United States, its officers or agents, as the following cases show:

In case No. 15,849 of Federal Cases, United States vs. Myler, the syllabus is:

> "Accused was indicted for defrauding the United States of a land warrant. The counsel for the prisoner raised the point of law that the act of Congress, Sec. 5421, under which the indictment against the prisoner was framed, was intended only for the punishment of those charged with defrauding the Government of sums of money, and that therefore the accused could not be convicted under it. The Court sustained the objection."

In Federal case No. 16,138 (4 Saw., 629), United States vs. Reese, quoting from the syllabus:

> "The first section of the act of March 3, 1823, for the punishment of the frauds committed on the Government of the United States,

applies only to instruments altered or forged for the purpose of obtaining money from the United States, their officers or agents."

In United States vs. Kessel, 62 Fed., 59, quoting from the syllabus:

"An indictment under section 5421 averring in substance that defendant transmitted to the Commissioner of Pensions a falsely altered certificate made by the board of surgeons in relation to a claim for pension of a named person, is bad in that it fails to show that said certificate was transmitted in support of or in relation to any specified account or claim pending in a named department or bureau or office."

In Staton vs. United States, 88 Fed., 253, Judge Thayer held:

That an indictment charging the forging of a name of a Justice of the Peace to accounts presented to the Government, with intention to defraud the United States, must be regarded as based on Secs. 5418 and 5479 and not on Sec. 5421, which denounces the making, altering or forging of papers for the purpose of obtaining from the United States any sum of money.

TWELFTH.

BOTH COUNTS BAD FOR DUPLICITY.

In the first count three different conspiracies are alleged; one in the City and County of Denver, one in Routt County, and one in Garfield County, each, to do all of the various acts alleged in the entire count. It cannot be seriously contended that the first count does not charge conspiracy in the City of Denver, or that it does not charge a conspiracy in the County of Routt, or that it does not charge a conspiracy in Garfield County, to do each and every of the acts, matters and things alleged to have been done in the entire indictment. We do not know, nor can we say, which of these three conspiracies the Government intends to prosecute the defendants upon. We may prepare to defend upon a conspiracy alleged to have been in Denver, and the Government may then move to Routt County. When we prepare to defend in Routt County the Government will again shift itself to Garfield County. These defendants not being advised as to which of these conspiracies they are now prosecuted for, could not in a subsequent action plead the former acquittal in bar. It is a rule announced by all Federal Courts that a defendant in an indictment has a right to know by the presentment, not only of what he is charged, but the time and place of the acts. The gist of the offense is the conspiracy, and from the indictment nobody can say whether it was formed in the City and County of Denver, in the County of Routt, or in the County of Garfield.

United States vs. Marx, 122 Fed., 964.

Counsel for the Government admit, in their brief in opposition to defendants' motion to dismiss, that the first

count charges two distinct offenses: "First, fraudulent acquisition of its (United States) coal land, contrary to the coal land laws, etc. * * * Second, fraud upon the administrative rights of the Government." (Brief, p. 3). This admission, and the fact that it not only embraces these two but at least three others, should be a sufficient condemnation of the first count.

In neither count of the indictment is it stated with any definiteness what the *gravamen* of the charge is; whether an attempt to defraud, or whether the *gravamen* is the means by which the attempt was made. It cannot be ascertained from the indictment whether it is sought to charge false and fraudulent entries by the entrymen who in fact made the entries, or whether the charge is against the alleged conspirators. And the indictment and both counts thereof are inconsistent and contradictory to the recitals in the overt acts; in the charging part it does not show that any act was done by any of the conspirators in furtherance of the conspiracy, but leaves it entirely to the overt acts, and in those we find the acts were done either by the entrymen themselves or by a regularly constituted attorney and agent under written authority. And again, the defendants are charged, first, with conspiring to divest the Government of lands; second, for misleading the Register and Receiver; third, in inducing the Register and Receiver to act otherwise than they would have acted; and fourth, to procure entrymen to sign and execute false, fictitious and forged affidavits; and fifth, to deprive the Government of its governmental functions.

The defendants may prepare a defense on one of these grounds, and find that the Government has taken some other. We do not know, nor can we ascertain from the indictment what the express crime is that we are

charged with. This does not comply with the Constitution of the United States nor with any rule of pleading. Neither count in the indictment points out any specific criminal act by which any of the ends above enumerated were sought to be accomplished; and the defendants cannot defend and have no means of defending against any such charge.

In the case of Blitz vs. United States, 153 U. S., 308, Justice Harlan said of an indictment which charged that the defendant did knowingly "personate and vote *and* attempt to vote" in the name of another person. That voting and attempting to vote may be two distinct offenses.

> "The first count leaves it in doubt whether it was intended to charge two distinct offenses, or only the offense of voting in the name of another person. This defect alone might not have been sufficient, after verdict, as ground for arresting the judgment on that count. But it is referred to as supporting or illustrating the rule that enjoins such certainty in an indictment as will inform the accused of the precise nature of the charge against him."

In the case at bar we have at least five different charges which may be crimes against the United States, and made so by statute. The objection may not be good if made after verdict, but the objection is certainly good when raised, as it is here, by motion.

As to the second count, the position taken by counsel in the Court below in his admission, practically, that there was not sufficient charged in the second count to make a crime under Sec. 4746, but that there was enough charged to make a crime under Sec. 5421 and Sec. 5438, and of the law of 1857 with respect to perjuries, (a statute which

has reposed in innocuous desuetude for half a century). Now, if this second count charges anything with respect to any of these statutes at all, it must be admitted by counsel that they are getting slightly outside of well defined judicial procedure in criminal cases, where the State must charge one crime and stand by it. Or if these sections provide a different punishment for a different crime, and if we are compelled to prepare for trial for one crime and the Government switches to another, what is there to stop it unless it is stopped in the beginning by saying that the count is totally and absolutely bad because of duplicity.

THIRTEENTH.

THE INDICTMENT MUST BE SPECIFIC.

The charging part of the indictment must contain every element of the offense, and it cannot be aided in any way or in any manner by any charge contained in an overt act.

In Pettibone vs. United States, 148 U. S., the Court said, at the top of page 203, that the indictment "cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

To the same effect is United States vs. Britton, 108 U. S., 199. We beg also to call the Court's attention to the indictment where it concludes with the allegation that the defendants sought to obtain about 5,000 acres of land "being" of the value of $500,000 (Record, p. 3). The indictment then proceeds to set forth that

> "at the time of making such false, fictitious, feigned, etc., entries * * * to make repre-

> sentations and statements of fact to the register and receiver of the said land office which would be known to the said defendants, agents and entrymen to be false and thereby wrongfully, unlawfully, etc., cause the Register and Receiver to act," etc., (Record, p. 3).

This is a sample of the pleading; nowhere is it alleged that any of these matters or things were, in fact, done or committed. The indictment then proceeds. In the first count (Record, p. 3) the indictment again starts off with the following words:

> "It being, as the grand jurors aforesaid, upon their oaths aforesaid, charge the fact to be the intention and desire of the said defendants." (Record, p. 3.)

This is alleged by way of recital, not charging it as a fact, but simply as a conclusion of the jurors. No issue can be joined on it; neither affirmed nor denied. This is not sufficient in an indictment. The "intention and desire" is the center around which the entire indictment gravitates. This states the object sought; without it there is nothing to the indictment. As said in the Pettibone case on page 202:

> "The charge must be made directly and not by inference or by way of recital."

To the same effect are

> United States vs. Cruikshank, 92 U. S., 542, 556-8.
>
> United States vs. Hess, 124 U. S., 483, 486-7.

Again quoting from page 207 of the Pettibone case:

> "But the specific intent to violate must exist to justify a conviction."

In the case at bar the only allegation respecting the intent, object or purpose of the conspiracy, is by way of recital and may as well have been omitted. The intent, object and purpose must exist, not existing, nor alleged, the indictment will not support a conviction.

Justice Story in United States vs. Elliott, F. C. 15,044, said, the words, "and so the grand jurors aforesaid, upon their oaths aforesaid, do find," etc., does not constitute any part of the charge in the indictment. It is simply a recital or conclusion of the grand jury for the purpose of advising the Court, and an indictment so charging is fatally bad. To same effect is:

Frisbie vs. United States, 157 U. S., 160, 168.

As to the power of Congress to regulate a corporation in the acquisition, control or disposition of property, Judge Jackson, Circuit Judge of the Sixth Circuit, *in re.* Green, 52 Fed., 104, 112, said:

> "But Congress certainly has not the power or authority, under the commerce clause or any other provision of the Constitution, to limit and restrict the right of corporations created by States, or the citizens of the States, in the acquisition, control and disposal of property. * * * It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions

of persons in the acquisition and control of property which the States of their residence or creation sanction and permit."

In this connection we say that as soon as there becomes a vested right of any character in the entryman, that moment the laws of the State attach and the power of Congress ceases, unless Congress has provided conditions subsequent which will control the power of alienation. Not having done so, in the coal land laws, the moment a vested right attaches, just that moment the power of Congress ceases.

U. S. vs. Fox, 94 U. S., 315, 320.

FOURTEENTH.

THE GOVERNMENT IS PRECLUDED BY LONG ACQUIESCENCE FROM PROSECUTING CRIMINALLY ANY ALLEGED VIOLATION OF THE MINERAL LAWS BY THE ENTRY OF COAL LAND.

As we have shown, from the decisions of the Land Department, from the decisions of this Court, and from the Federal Circuit Courts, there never has yet been until these cases, an attempt at a criminal prosecution for the matters complained of in the indictment. The Department of the Interior, and every other executive department of the Government, for 35 years, have never considered a violation of the coal land laws or the rules of the Department, however violated, whether in letter, spirit or policy,

criminal, but the utmost liability in their opinion which attached to such violation, whether involving moral turpitude or otherwise, was simply a civil tort against the United States which would set aside, in a proper suit in equity, the entry so made.

The Trinidad case was decided by this Court eighteen years ago and no criminal proceedings of any character were ever brought against any of the people connected with the frauds there mentioned.

The Department, as we have shown, having held out for 35 years, the right of assignment of coal land entries under Rule 37, accepting and recognizing all sorts of assignments and all sorts of entries, having for that period of time induced the public to believe that there was nothing criminal and nothing involving moral turpitude in an act violating the spirit or policy of the law,—we say that Courts should not only look with disfavor upon any attempt at a criminal prosecution, but should with one accord give conclusive weight to such past construction of the law and conduct of entrymen, and say, that Courts will not lend their aid to assist the delinquencies of the Government and its officers in its failure to make it known, that such acts were, or ever have been, considered criminal. Having lulled the citizens of this country into a sense of security, by such uniform construction for so long a period of time, and in the confirmation of alleged voidable entries by patent, the Government should be relegated to its relief in equity, until Congress has seen fit to make some radical change in the law.

A failure to prosecute, is no excuse for committing a crime, nor does it render the law non-enforceable; but when the Department for thiry-five years, has uniformly ruled that the act is not a crime; when this Court has said that

the penalty was the loss of the money paid as well as a loss of the land, and that that was a sufficient penalty (United States vs. Detroit L. Co., 200 U. S., 321, 339), why should the Government now, in all fairness to the entryman, be allowed to change positions and prosecute a person criminally, for doing that which the Department and the Courts have said repeatedly was not a crime. The law will not say to one, your act is a crime, while to another, you committed the same act, but in your case it is not a crime, but a constructive fraud. It was constructive fraud in the Trinidad case eighteen years ago. It was constructive fraud in the Detroit Lumber case two years ago. Senators Teller and Vilas, when they were Secretaries of the Interior, did not consider it even constructive fraud.

A man may not thus be induced to commit a crime, and when he has committed it, prosecute him. When he is told by those who enforce the law, that he may do certain things and that it is perfectly legal, so far as that act is concerned, it is legal. These defendants have only done what hundreds, yea thousands, have done before them. These prior acts have been confirmed by the Department, and the entries passed to patent. The indictment charges no act that has not by some Secretary of the Interior, at some time or other, been confirmed.

> "No man should be held penally responsible for acts which at the time of their commission were not pronounced by the law to be criminal."
>
> Wharton Crim. Law, Sec. 2316.

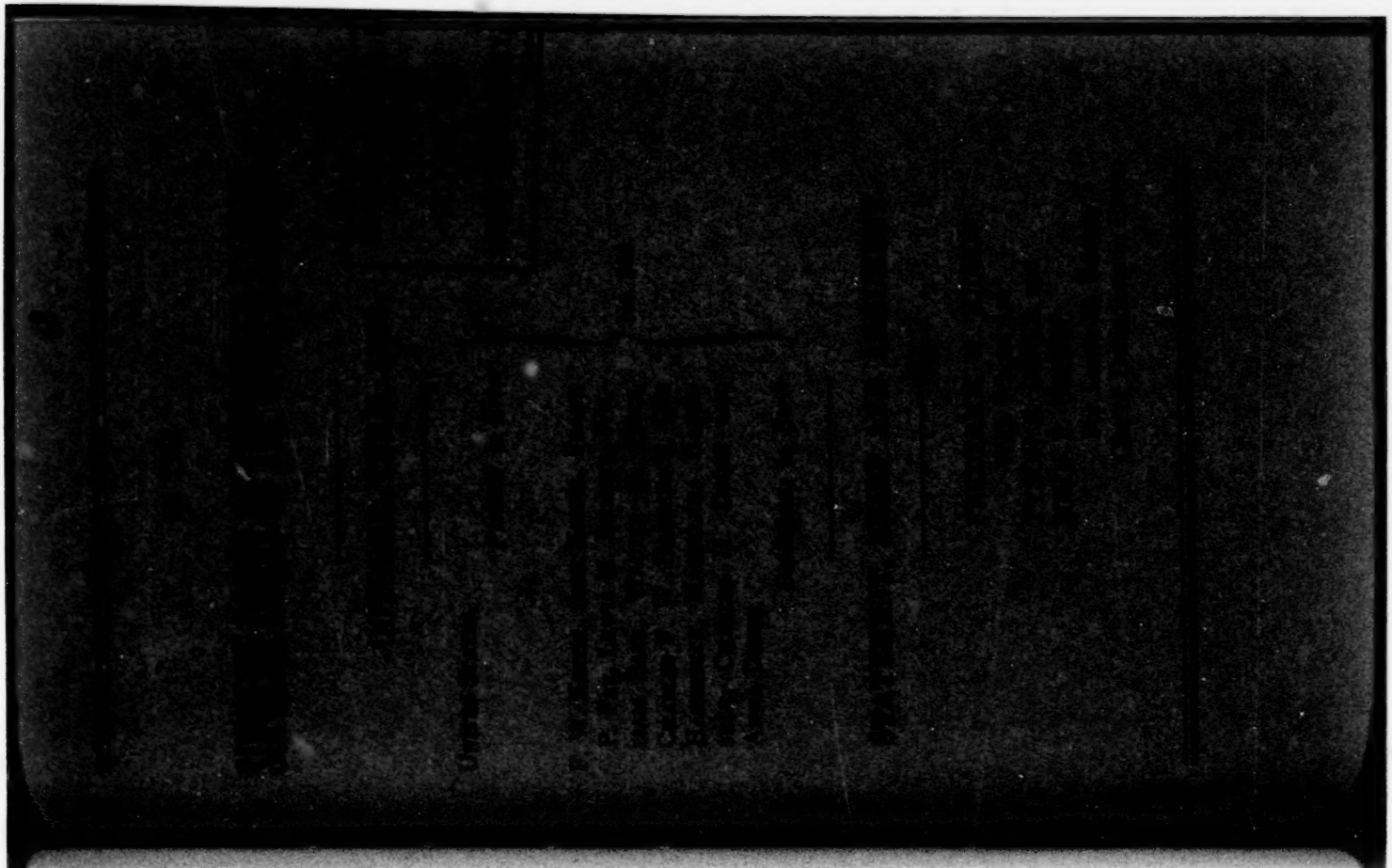
We therefore say, that there is no crime charged in the indictment, nor in either count thereof.

For all of which matters and things we ask that the order of the Court below be affirmed, that the indictment be quashed, and that the defendants go hence without day.

Respectfully submitted,

EDWIN H. PARK,

Attorney for F. W. Keitel, Arie Keitel, Frank P. Fay, Walter S. Price, Charles H. Dodge, Anna Dodge, Charles F. W. Haberbeck, Magdalena Haberbeck, and Gus Haberbeck, Defendants in Error.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

UNITED STATES,
Plaintiff in Error.

vs.

F. W. KEITEL, ARIE KEITEL, FRANK P. FAY, LEWIS M. RUMSEY, WILLIAM BAER, WALTER S. PRICE, CHARLES F. W. HABERBECK, GUS HABERBECK, MAGDELENA HABERBECK, CHARLES H. DODGE AND ANNA DODGE,
Defendant in Error.

STATEMENT.

This case comes to the Court by writ of error sued out on behalf of the United States under Act of March 2nd, 1907, from a judgment of the District Court of Colorado sustaining motions to quash indictment of the several defendants for alleged conspiracy under Sec. 5440, R. S. U. S., in the entry of coal lands under Sec. 2347 to 2351 R. S. U. S.

The Indictment.

The indictment was in two counts with the alleged twenty-four overt acts of the first count and the sixteen of the second count, and includes forty-four pages of the printed record (Rec., p. 2-46). The twelve named defendants are alleged in each count to have "unlawfully, wilfully, wickedly, corruptly and knowingly" conspired with certain named parties, who are referred to as agents of the defendants, and with divers other unknown persons to make "false, fictitious, feigned, illegal, forged and fraudulent entries and filings, declaratory statements, powers of attorney, non-mineral affidavits in the land office of the United States at Glenwood Springs in the county of Garfield."

The venue of this alleged conspiracy in each count is thus stated: "On the 11th day of June, in the year of Our Lord, One Thousand Nine Hundred and Four, in the *County of Garfield*, in the *County of Routt*, in the *County of Denver*, and within said district of Colorado, and within the jurisdiction of this Court." There is no specification in the charging part of the first count of the unlawfulness of the aim of the alleged conspiracy, except that it was the intention and design of the defendant to furnish entrymen with the money necessary to make payment to the Receiver of the Land Office of the price fixed by law for the said lands, and to acquire and receive conveyances from the said entrymen and agents to be made to themselves, the said defendants and the Yampa Anthracite Coal Co., a corporation, and that by means of the "false, fictitious, illegal, feigned, untrue, forged, false and fraudulent" entries, defendants would obtain for themselves and for said corporation from said United States certain of the public lands and property of the United States in quantity greatly in excess of what either would obtain directly from the United States, and in that manner to "deprive the United States of its valuable property in the lands, and also of its governmental function in

the matter of preserving and disposing of the land, as well as of its right to administer an intelligent and honest service in that behalf in the interest of the people of the United States." (Rec., p. 4.)

The first count alleges that the alleged conspiracy was to obtain the lands otherwise than they could be obtained under the lawful administration of the rules and regulations theretofore made and prescribed pursuant to law by the Commissioner of the general land office with the approval of the Secretary of the Interior (Rec., p. 4). These rules and regulations alleged to have been in force are not set out in either count: It is also alleged that the statements, representations, affidavits and filings would not be made under oath before an officer competent to administer an oath; that the jurats thereto would be "false, fictitious, forged and fraudulent;" that the entryman would well know that he would not be purchasing or intending to purchase said lands for himself at all, but in collusion with and for the benefit of the defendants and said corporation, and under which agreement the entrymen, who by means of such entries and by payments to the receiver of the land office of price fixed by law for said land, to obtain from the United States its title by patent, and the possession and use and benefit of such coal lands, which said money was, as aforesaid, to be furnished to said entrymen by defendants; and under which agreement also the said entrymen were thereupon severally to make conveyances of the title of such coal land to said defendants and said corporation.

The first count sets out twenty-four alleged entries, all of them cash entries under Sec. 2347 R. S. U. S. The first overt act charged that defendants F. W. Keitel and Arie Keitel filed the coal cash entry of one Margenau and the papers, statements and affidavits therewith, the defendants theretofore having procured the said Margenau to subscribe his name to said "false, fictitious, forged and fraudulent papers."

The second overt act charged that the same two defendants unlawfully persuaded and hired one Barnes to subscribe his name to a certain non-mineral affidavit "required by law and the rules and regulations of the interior department in the coal land entry of Margenau to which affidavit Barnes did not make oath.

The remaining twenty-two overt acts in the first count all relate to the filing by the two Keitels of the same character of papers. That is to say, cash entries with the non-mineral affidavits, the same being styled as "false, fictitious, forged, illegal and fraudulent," but no statement being made as to whether the papers were false, fictitious, forged or fraudulent. In none of these counts are the alleged corrupt papers set out, though in each case the paper is alleged to have been false, fictitious, forged and fraudulent."

The second count differs from the first count in that it seems to attempt to charge an offense under the first clause of Sec. 5440, to-wit, conspiracy to commit an offense against the United States in that the conspiracy is alleged to have been made in a matter within the jurisdiction of the Secretary of the Interior in violation of Sec. 4746 of the Revised Statutes of the United States. This count also sets out that the alleged "false, fictitious, illegal, feigned and fraudulent" entries were in lieu of honest and bona fide entries and papers required by said land regulations from said entrymen, but in this count as in the first the regulations of the department are not in any wise set out. It charges that the conspiracy was to consist in part in procuring, inducing, persuading and hiring divers persons called entrymen, and mentioned by name in the overt acts to make, subscribe and present and cause to be made, subscribed and presented to the register and receiver, "false, fictitious, feigned, illegal, forged and fraudulent" filings, declarations, affidavits, certificates and papers, and writings purporting to be such pertaining to the entry of said coal lands, and that said matter

and proceedings, before said register and receiver, was within the jurisdiction of the Secretary of the Interior; that these declarations, affidavits, certificates, writings, papers, filings so procured to be made by said entrymen were "false, fictitious, feigned, illegal, forged and fraudulent" and in violation of Sec. 4746; that these false, and fraudulent papers contained false, and fraudulent statements material to the proceedings in the entry of said lands.

It is then charged that the purpose of the unlawful conspiracy was to be accomplished in the same manner as in the first count.

The sixteen overt acts set forth in the second count differ from those set out in the first count only in that the several powers of attorney alleged to have been executed by the different entrymen are set out; but in none of them is the alleged specific defect set out, although they are all alleged, as in the first count, to have been "false, fictitious, feigned, forged, and fraudulent." In certain of the cases it is alleged that the power of attorney was *subscribed* by the entrymen and that the same was *not* subscribed but "forged."

In neither count of the indictment is there in the charging part of the overt act any charge that any entryman was not to possess and did not possess the statutory qualification, that is, twenty-one years of age, citizenship, or that the legal price was not to be paid, and was not paid, or that any one of said entrymen had theretofore exercised this right. In each count of the indictment it is alleged in the charging part that the conspiracy contemplated the entry of lands by the entrymen, and not by the conspirators themselves, while it appears in the overt acts in both counts that the alleged entries were made by one or two of the alleged conspirators, although the Yampa Anthracite Coal Co., is named as a corporation and a beneficiary of certain of the entries in both counts, there is no allegation in either count as to the rela-

tion of any of the defendants to this corporation, whether they were members, stockholders, officers or employees, or whether they were strangers. There is no allegation as to how this corporation was organized, or what was the relation of the respective defendants, or how much of the land was to be conveyed to the corporation.

The motion to quash is filed by defendant, Rumsey, who was named as one of the defendant conspirators, but whose name does not otherwise appear in either count of the indictment, nor is he named in connection with any one of the overt acts charged in connection with either.

The Conspiracy Statute.

The indictment is bottomed on Sec. 5440, R. S. U. S., as amended by the Act of May 17th, 1879, which reads as follows:

> Sec. 5440. "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do an act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

The Coal Land Statute.

With this statute must also be construed the statute of the United States relating to the entry of coal lands. (Act of March 3, 1873, R. S. 2347- 352, V. Fed. Stat. Ann. p. 55-157.)

> "Sec. 2347. Every person ~~under~~ above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall,

upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road."

"Sec. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres including such mining improvements."

"Sec. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third

day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three."

"Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, and member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant."

"Sec. 2351. In case of conflicting claims upon coal lands where the improvements shall be commenced, after the third day of March, eighteen hundred seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, 1873, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The commissioner of the Generai Land Office is authorized to issue all needful rules and regula-

tions for carrying into effect the provisions of this and the four preceding sections."

These are the only statutes relating to the entry of coal lands. It will be observed that there is no penalty prescribed in any coal land statute, nor is there any prohibition of alienation, nor is there any form of affidavit prescribed either in the case of a cash entryman or a preferential entryman, and the only limitation is that the individual entryman is limited to 160 acres and an association to 320 acres, and that the price is fixed at $10 per acre for such lands, where the same shall be situated more than 15 miles from any completed railroad, and not less than $20 per acre for such lands as shall be within 15 miles of such road; while in the case of a preferential entryman an association expending money under certain conditions may enter 640 acres.

The Rules and Regulations of the Department.

There is no authorization in this statute concerning the making of rules and regulations except in Sec. 2351. The Commissioner of the Land Office is there authorized

> "To establish all needful rules and regulations for carrying into effect the provisions of this and the preceding section."

The rules and regulations, though their alleged violation was charged to be the purpose of the conspiracy, are not set out in either count of the indictment. It was conceded that the transactions claimed to have been embraced in the alleged conspiracy, were *private cash entries* under the provisions of Sec. 2347, R. S. U. S., and that *no preferential* entries under Secs. 2348 and 2349 of the Act were in any way involved. All of the overt acts in both counts related to private cash entries.

While the statute made no requirement for affidavit of any kind for either class of entry, that is, for either cash or

preferential entry of coal land, therein differing radically from all other public lands as hereafter shown, it is also true that at the time of this alleged conspiracy, there was no provision, *even in the rules and regulations of the Land Office,* for any affidavit or statement from the applicant as to the pre-contract of the sale of his right. The form of affidavit prescribed for such cash entries, which have been in force since the enactments of the statute related only to the statutory qualifications of the entrymen and the character of the land entered. In the affidavit required for preferential entry, on the contrary, there was a provision in the rules (though not in the statute) that the "entryman was in the actual possession of the mines and made the entries for his own use and benefit and not directly or indirectly for the use and benefit of any other person." This requirement has no application under any theory of the case to the case at bar for the reason as stated above, the alleged conspiracy in both counts relating solely to cash entries.

THE PUBLIC LAND STATUTES OF THE UNITED STATES IN REGARD TO RIGHT OF ALIENATION.

The provisions of the Coal Act, *supra,* in making no provision either by way of penalizing or even prohibiting alienation by pre-contract or otherwise, are in sharp contrast with the provisions of the Pre-emption Statute of the United States relating to public lands. Thus, the original Pre-emption Statute of September 4th, 1841, provided as follows: (See 6 Anno. Stat. U. S. p. 280.)

> "Before any person claiming the benefit of this chapter is allowed to enter lands, he shall *make oath* before the receiver or register of the land district in which the land is situated that he has never had the benefit of any right of pre-emption under section twenty-two hundred and fifty-nine; that he is not the owner of three hun-

dred and twenty acres of land in any State or Territory; *that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself;* and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, for a valuable consideration, shall be null and void, except as provided in section twenty-two hundred and eighty-eight. And it shall be the duty of the officer administring such oath to file a certificate thereof in the public land office of such district, and to transmit a duplicate copy to the General Land Office, either of which shall be good and sufficient evidence that such oath was administered according to law."

This was amended by Act of June 9th, 1880, as follows:

(See 6 Anno. Stat. p. 298)

"That the affidavit required to be made by sections twenty-two hundred and sixty-two and twentty-three hundred and one of the Revised Statutes of the United States, may be made before the clerk of the county court or of any court of record, of the county and State or district and Territory in which the lands are situated; and if said lands are situated in any unorganized county, such affidavit may be made in a similar manner in any adjacent county in said State or Territory and the affidavit so made and duly subscribed

shall have the same force and effect as if made before the register or receiver of the proper land district, and the same shall be transmitted by such clerk of the court to the register and receiver with the fee and charges allowed by law."

The pre-emption laws were repealed by Act of March 3rd, 1891, with saving of rights as to pending claims.

The Homestead Law: The original Homestead Law of May 20th, 1862, provided as follows: (See 6 Anno. Stat. p. 290.)

> "The person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, *make affidavit* before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the Army or Navy of the United States, and that such application is made for *his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any person;* and upon filing such affidavit with the register or receiver, on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified."

This was amended by Act of March 3rd, 1891, to read as follows:

> "That any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office *an affidavit* that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of

actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; *that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself or herself,* and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified."

The Timber and Stone Act: The Act providing for the sale of timber and stone lands of June 3rd, 1878, 7 Fed. Ann. Stat. p. 301, provides, Section 2, as follows:

"That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same

is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; *that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant* before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."

For the construction of this provision, see U. S. v. Budd, 144 U. S. 154.

The Desert Land Laws: The Act of March 3rd, 1877, 6 Fed. Anno. Stat. 392, for the reclamation and purchase of desert lands, Section 1, requires that it should be lawful for any citizen, or one entitled to become a citizen, to file a declaration under oath of an intention to reclaim a tract, and within three years thereafter to make satisfactory proof of the reclamation.

The Timber Culture Land Laws: The original Culture Act provided, Sec. 2465 Fed. Anno. Stat. p. 495, for the filing of affidavits by the person applying for the benefit of the preceding section. The sections of this Act incorporated in the Rev. Stat. of the Timber Culture Act of March 3rd, 1873, were amended by later Acts so as to read, Sec. 2, as follows:

> "That the person applying for the benefits of this act shall, upon application to the register of the land district in which he or she is about to make such entry, make affidavit, before the register or the receiver, or the clerk of some court of record, or officer authorized to administer oaths in the district where the land is situated; which affidavit shall be as follows, to-wit:
>
> "I, ..., having filed my application, number ....., for an entry under the provisions of an act entitled An act to amend an act entitled 'An act to encourage the growth of timber on the Western prairies' approved ..... 187... do solemnly swear (or affirm) that I am the head of a family (or over twenty-one years of age), and a citizen of the United States (or have declared my intention to become such); that the section of land specified in my said application is composed exclusively of prairie lands, or other lands devoid of timber; that this filing and entry is made for the cultivation of timber, *and for my own exclusive use and benefit; that I have made the said application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever;* that I intend to hold and cultivate the land, and to fully comply with the provisions of this said act; and that I have not heretofore made an entry under this act or the acts of which this is amendatory. * * *"

This Act was repealed by Act of March 3rd, 1891. (See Fed. Anno. Stat. p. 497.)

The Oklahoma Land Act: Section 24 of the Act of May 2nd, 1890, concerning Oklahoma, provides as follows: (See 6 Anno. Stat. p. 418, Sec. 24.)

> "That it shall be *unlawful* for any person, for himself or any company, association, or corporation, *to directly or indirectly procure any person to settle upon any lands open to settlement in the Territory of Oklahoma, with intent thereafter of acquiring title thereto;* and any title thus acquired shall be void; and the parties to such fraudulent settlement shall severally be guilty of a misdemeanor, and shall be punished upon indictment, by imprisonment not exceeding twelve months, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment, in the discretion of the court."

The Affidavits and Public Land Entries Act: The Act of March 11th, 1902, amends Section 2294 R. S. to read as follows: (See 6 Fed. Anno. Stat. p. 304.)

> "That hereafter all *affidavits, proofs, and oaths* of any kind whatsoever required to be made by applicants and entrymen under the *Homestead, Pre-emption, Timber Culture, Desert Land, and Timber and Stone Acts,* may, in addition to those now authorized to take such affidavits, proofs and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the territory or before the judge or clerk of any court of record in the land district in which the lands are situated; Provided, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land

Office, that it was taken before the nearest of most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. *That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, wilfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury,* and shall be liable to the same pains and penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register or receiver, shall be as follows. * * *"

The Motion to Quash: Motions to quash were filed by the different defendants substantially in the same form (Rec. pp. 47 to 55, for motion of this defendant), on the ground that neither count charged the defendant with any crime against or under the laws of the United States, and that each count was bad for duplicity, uncertainty and vagueness. These motions having been submitted, were argued at length and were sustained by the Court December 30th, 1907, in an opinion by Judge Robert E. Lewis (Rec. pp. 97 to 102), omitting the statement of the two counts, as follows:

OPINION OF JUDGE LEWIS, QUASHING INDICTMENT.

First Count.

The indictment in the first count attempts to charge a conspiracy under Sec. 5440 R. S. U. S. That section and the acts of March 3, 1873, known as the Coal Land Act, will require consideration. The indictment shows that the entries were what are commonly called cash entries, made under the first section of that Act; and not what are known as preferential entries, provided for under sections 2 and 3 of the Act. The only filing with the register by the entryman under the first section of the act, if any, is his application. Hence the indictment wherein it charges the making of false, etc., powers of attorney, non-mineral affidavits, and affidavits at purchase and other representations and statements made to the register and receiver must be taken as charging a violation of the rules and regulations of the Land Office Department and the practice in the local land office.

We first put out of view these rules and regulations if they cannot be made the basis of a crime. In United (States) v. Eaton, 144 U. S. 677, 687, it is said:

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 American & English Encyclopedia of Law, 642; 4 Bl. Com. 5.

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargerine Act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargerine, in such manner

as to become a criminal offense punishable under Sec. 18 of the Act; particularly when the same act, in Sec. 5, requires a manufacturer of the article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require, and does not impose, in that section or elsewhere in the Act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

"It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargerine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in Sec. 41 of the Act of October 1, 1890.

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the things a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

To the same effect are the following:

U. S. v. United Verde Cooper Co., 196 U. S. 207.
U. S. v. Manion, 44 Fed. 800.
U. S. v. Maid, 116 Fed. 650.
U. S. v. Blassingame, 116 Fed. 654.
U. S. v. Hoover, 133 Fed. 950.
U. S. v. Matthews, 146 Fed. 306.

When these rules and regulations are put by the side, we have what left? In substance this: That the defendants under several agreements with qualified entrymen induced said entrymen to severally enter at the Land Office coal lands within the limit of acreage prescribed by the act for the use and benefit of the corporation and defendants, and pay for the same with moneys of the corporation. The only inquiry is whether we can find in what is left a crime under the second clause of Section 5440, to-wit: a conspiracy to defraud. The words of that clause of the section do not specifically spell out the offense. We look to the common law to find what they mean. In Pettibone v. U. S. 148, U. S. 197, it is said: "Courts of the United States * * * resort to the common law for the definition of terms by which offenses are designated."

Certainly the term *defraud* as here used cannot be accepted in its broadest sense. If so, it would cover constructive fraud known in equity; and thus until the Chancellor decrees on given facts, no man knoweth what offenses he has committed. That sequence impresses me as a legal perversion.

Thus it seems that the case of the Trinidad Coal and Coke Company, in 137 U. S., 161, so much relied on by the prosecution, cannot be carried over into the domain of criminal jurisprudence to be used here for the purpose of defining that term. It would therefore appear that the broadest stretch to which we can carry the term is to take it at its criminal aspect, as known, if so known, to the common law. And when we seek to do that, no authority has been cited where the term has been used to sustain that view so needful here. We can make the attempt to so understand it by analogy; but that step leads at once to find the crime by construction and implication which we are not permitted to do. If the cases and doctrine at common law were obviously and unmistakenly apposite, then it would not be construction,

and the path would be clear, but they are not. In Todd v. U. S., 158 U. S. 278-282, we find this:

"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment and that no act, however, wrongful, can be punished under such a statute, unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.' U. S. v. Lacher, 134 U. S. 624; Endlich on the Interpretation of Statutes, Sec. 229, 2d. Ed.; Pomeroy's Sedgwick on Statutory and Constitutional Construction, 280."

But returning to the common law—there are there the offenses known as cheats. It involved the use of a false device or token. It was carried also to the use of latent adulteration of food prepared for men and intended for use by many. They are discussed by Mr. Wharton in his work on criminal law, 7th Ed., Vol. 2, Sec. 2056, et seq. These might be called primary offenses. Thereafter an act of Parliament made the obtaining of goods and chattels by false pretenses a crime, and like statutes are found in most of the States. The act of Parliament did not, however, extend this offense to the acquisition of realty. After a full discussion of the statutory offenses last referred to, the same author treats of conspiracy as an offense, and in the course of his discussion reaches conspiracy where the means used are not criminal to accomplish an end not criminal; to which we find this preface (Sec. 26, 216):

"At the same time it is important to keep in mind, especially at this point, the principles heretofore announced that indictments for conspiracy, always perilous to liberty from the extent and vagueness of the province which they overshadow, are never so much so as when they undertake to punish acts of whose intrinsic criminality the law gives no prior notice. If any indictments of this class by stress of settled jurisdiction must be hereafter tolerated, the doctrine

on which they rest should be carried no further than the latter of these jurisdictions require."

In the list of cases which he then qualifies as falling under this head, we find none bearing any similitude to the crime here sought to be charged. I think it may be fairly concluded from what that and other authorities on criminal law say as well as from the adjudicated cases, that in such conspiracies the ends intended by the conspirators must necessarily involve moral turpitude of the basest sort in the result if successful—such as threaten the health of a large body of people by the sale of impure food; or in some instances even life. The latter kind is aptly illustrated in U. S. v. Stone, 135 Fed. 392.

I am therefore deepy impressed with the belief that the Chief Justice meant in his definition in Pettibone v. U. S., 148 U. S., supra, to cover both classes of Section 5440. He said:

"A conspiracy is sufficiently described as a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

Saving perhaps such cases as when the facts bring them clearly within the rare common law cases supra.

The entrymen were qualified as such. They obtained no more land than the acreage limited in the Act, and they paid the price fixed by Congress. The only offending charge against the defendants is that by their procurement and entrymen acted for the corporation. *The Act does not denounce that they did as criminal, nor does it place a prohibition against their conduct so that we could say their acts are therefore unlawful.* But their acts are said to be violative of the *policy* disclosed by the Coal Land Act. In Hadden v. The Collector, 5 Wall. 107-111, Justice Field, speaking for the Court, said:

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing upon which all sorts of opinions, each varying from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of the statutes."

When the Coal Land Act was passed, little was known of the locality and extent of coal measures in this Western country; and if we were permitted in this case to seek for a policy in that Act we would say that the predominant one was to induce the discovery and development of such deposits.

If we could search further for a policy applicable in this day, we would find weight in the appropriate words of Sharswood:

"Time, itself, which works such mighty changes in all things, produces a state of circumstances not in the mind of the law-giver."

And in connection with what has already been said it is necessary to bear in mind the rules of construction here applicable.

In Smith v. Townsend, 148 U. S., 490-497, we find this:

"Statutes against fraud are to be liberally beneficially expounded. This may seem a contradiction to the last rule, most statutes against fraud being in their sequence penal; where the statute acts upon the offender and inflicts a penalty, as the pillory, or a fine, it is then to be taken strictly; but when the statute acts upon the offense by setting aside the fraudulent transaction here it is to be construed liberally." (1 Bl. Com. 88.)

In France v. U. S., 164 U. S. 678, it is said:

"The statute does not cover the transactions, and, however reprehensible the acts of the plaintiff in error may be, we cannot sustain a conviction on that ground. Although

the objection is a varying one, yet the statute being highly penal, rendering its offender liable to fine and imprisonment, we are compelled to construe it strictly. * * *

If it be urged that the acts of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

The rule of strict construction in favor of a defendant charged with a crime as well as the presumption of innocence, and the requirement that guilt must be proven beyond a reasonable dobut are priceless heritages that have come down to us as warnings out of the bloody tyranny and oppression. And while there be some who doubt their present-day necessity, they remain unbroken. For further cases sustaining the rule, see U. S. v. Clayton, 2 Dillon 219, (F. C. 14814); U. S. v. Wiltberger, 5 Wheat. 76; Francis v. U. S., 188 U. S. 375; U. S. v. Bencoke, 98 U. S. 447.

I am clearly of the opinion that the first count does not state an offense and the motion to quash is therefore sustained.

Second Count.

The indictment attempts to charge in the second count an offense under the first clause of Section 5440, to-wit: a conspiracy to commit an offense against the United States. The means to be used, as heretofore seen in the discussion on the first count, were neither criminal nor unlawful, but it is claimed that the end to be accomplished is a crime, to-wit: a violation of Section 4746, which is expressly penal; and it is further claimed that the acts charged bring the case within the terms of the latter section. It is necessary to support the last contention in order to sustain the second count, we therefore direct our attention to that point.

This Section 4746 was originally and prior to the amendment Section 33 of the Act of March 3, 1873, which was entitled "An Act to Revise, Consolidate and Amend the Laws Relating to Pensions." (17 Stat. L. 566.) That section (33) was amended by the Act of July 7, 1898. We here give the original section (33) and the amended section (Sec. 4746), the amendment being within the parenthesis, as follows:

> "That every person who knowingly or willfully (makes or aids, or assists in the making, or) in any wise procures the making or presentation of any false or fraudulent affidavit (declaration, certificate, voucher, or paper or writing purporting to be such), concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions (or of the Secretary of the Interior),
>
> or who knowingly or willfully (makes or causes to be made, or aids or assists in the making, or) presents or causes to be presented any pension agency any power of attorney or other paper required as a voucher in drawing a pension, which papers bears a date subsequent to that upon which it was actually signed or (acknowledged by the pensioner,
>
> and every person before whom any declaration, affidavit, voucher, or other paper, or writing to be used in aid of the prosecution of any claim for pension or bounty land or payment thereof purports to have been executed who shall knowingly certify that the declarant, affiant, or witness named in such declaration, affidavit, voucher, or other paper or writing personally appeared before him and was sworn thereto, or acknowledged the execution thereof, when, in fact, such declarant, affiant, or witness did not personally appear before him or was not sworn thereto, or did not ac-

> knowledge the execution thereof), shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term of not more than five years." (July 7, 1898.)

The word "acknowledged" was inserted in place of "executed."

Original Section 33 received consideration in the Supreme Court in Edgington v. U. S., 164 U. S., 361. The subject there specially treated was whether Section 5438 was repealed by Section 4747 (being original Section 33). The Court said:

> "We are unable to accept the contention that the latter section is to be deemed a repeal of the former. Undoubtedly there is some ground that is common to both. Thus the procuring or causing to be made false deposition or affidavit in promoting a fraudulent pension claim is made an offense by both statutes. But the earlier statute is wider in its scope because *not restricted to fraudulent pension claim not to merely procuring a false affidavit to be made.*"

In Pooler v. U. S., 127 Fed. 509, Sec. 4746 as now amended was construed as applicable only in pension matters.

In view of the foregoing authorities, the title of the act, the phraseology of the section as amended, and the discussion of the amendment (record of which was exhibited in argument), I think, under familiar rules of construction the amended section (4746) must be taken as applicable only to pension matters (the claim being bounty land) before the commissioner or secretary.

It is urged that the broad language "or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or the Secretary of the Interior" should be taken to cover everything which those officers are given

authority to hear. But it must be noticed that all of this was a part of the original act except the phrase "or the Secretary of the Interior." Consequently, the original act in the phrase "or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions" could not under the rule *ejusden generia* go beyond the special subjects therein named, to-wit: claims for pensions or bounty land; and for greater reason this must be so when we consider the limited duties and jurisdiction of the officer as they existed then and there. I think the obvious purpose of the amendment in the particular new considered was to reach falsification before the Secretary in such matters when appealed to him from the Commissioner.

But inasmuch as unreported cases from other districts have been called to my attention, in which my brothers appeared to hold to the contrary, and seem to take the view that the phrase "or pertaining to any other matter" should be construed to cover all subject-matters within the jurisdiction of either the Commissioner or Secretary, I waive my view in that particular here.

We come then to consider how we shall understand the section in this particular; "or pertaining to any other matter within the jurisdiction * * * of the Secretary of the Interior." The indictment charges that the false filings, declarations, affidavits, certificates, papers and writings issued in each particular entry as a matter and proceeding before the register and receiver *within the jurisdiction of the Secretary of the Interior.* The register and receiver are not subordinate officers to the Secretary in the sense that they act for him, and perform duties incumbent on him. They are not his agents. They hold office under an appointment by the president. They discharge duties fixed on them by statutes. Their findings on some cases are final, in others there is a right of appeal to the Commissioned of the Land Office, and from his ruling to the Secretary.

What is meant by *jurisdiction* as here used? Its prime conception is one of power. When used in a political sense it means governmental authority; such as when we say the Federal Government has jusirdiction over navigable waters and interests commerce; such as when we say a state has jurisdiction over affairs purely local. The section does not use the phrase "within the jurisdiction of the Secretary of the Interior" in that sense. That would smack too much of that imperialism when the spirit of the Cæsars brooded over that vast empire from whose capitol city an impending hand reached out to its remotest confines.

The word *jurisdiction* must be here used in its legal sense meaning authority to hear and determine a cause. Daniels v. Tearney, 102 U. S., 415-18; Simmons v. Saul, 138 U. S., 439-54.

But in determining whether the Secretary had authority to hear and determine the matters charged to have been presented to the register and receiver, other statutes must be considered. He could not by his own motion take the matter then pending in the local land office to himself for decision. It could only reach him, if at all, by a process of appeal as provided by statute. It is not charged that the matter was appealed to him. Indeed it was tacitly admitted in argument that the matters progressed no further than where they were first lodged with the receiver and register. In no event is jurisdiction acquired by a Court or officer on whom the law confers the power until the power so given is exercised or invoked by an interested party. To hold that the secretary had jurisdiction of the matters charged in the indictment would be to liken jurisdiction in its legal sense to jurisdiction in its political sense, which can not be done under this statute. I think it clearly appears that the matters charged in the indictment were not within the jurisdiction of the Secretary as contemplated in Sec. 4746.

But aside from this, and waiving all that has been said, it appears from the indictment that the entry of coal land complained of in the indictment were made under section 1 of the act of March 3, 1873. That act does not require of the entrymen any of the affidavits, certificates, papers and writing complained of in the second count. These papers must therefore have been required, if required at all, by the rules and regulations of the Land Office. The act may be said to require in all propriety a written application by the entryman showing that he is qualified as such, and has not theretofore exercised his right; but these facts are not negatived. So we view the matters complained of as papers and writings required by rules and regulations. And in that contention we find ourselves again directly in opposition to the principles declared in U. S. v. Eaton, 144 U. S. 677, and many other cases cited, supra. We quote again from the Eaton case:

> "Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offence by the regulation of a department. It is a principle of criminal law that an offence which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law either forbidding or commanding it.' 4 Am. Eng. Enc. L., 642; 4 Bl. Com. 5.
>
> It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business or a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act * * * Regulations prescribed by the President and by the heads of the departments under the authority granted

by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the things a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

It seems to me that to hold that the second count charges an offence, would be going in direct conflict with what is said in the Eaton case.

For these reasons the motion to quash the second count is also sustained.

(Signed) ROBERT E. LEWIS,
District Judge.

December 30th, 1907.

BRIEF.

The writ of error in this case is sued out under the act of March 2nd, 1907, and this act was sustained and enforced by this court in two cases at the last term.

U. S. vs. McDonald, 207 U. S. 531.
U. S. Vitty, 208 U. S. 393.

As no question of the validity of the statute upon which the indictment was based was made in the court below, the question of jurisdiction under the act will depend upon whether the decision was based upon the *construction* of the statute. The Court below found that the facts set out in the indictment were insufficient to charge a crime under the statute. The question resolves itself therefore into whether the court primarily construed the statute or construed the indictment. We do not deem it necessary to discuss the question of the jurisdiction, as it has been fully presented in the brief filed by counsel for the co-defendants. We proceed, therefore, with the discussion of the merits.

I.

There are no common law offenses against the United States. Any offense which may be the subject of criminal procedure in a court of the United States, must be an act committed or omitted in violation of a public law of the United States either prohibiting it or commanding it.

U. S. vs. Hudson, 7 Cranch, 32.
U. S. vs. Cooledge, 1 Wheat. 415.
U. S. vs. Wiltenberger, 5 Wheat. 76.
Manchester vs. Mass. 139 U. S. 240.
U. S. vs. Eaton, 144 U. S. 678.
U. S. vs. Britton, 108 U. S. 199.
U. S. vs. Clayton, 2 Dill. 219.
U. S. vs. Manion, 44 Fed. 800.
Todd vs. U. S., 158 U. S. 278.

II.

It necessarily follows, and has been declared by this Court, that a requirement in a rule or regulation of a department cannot make any act or neglect to act a criminal offense in the absence of a statute making such act or neglect a criminal offense.

U. S. vs. Eaton, 144 U. S. 677.
Caha vs. U. S., 152 U. S. 211.
Williamson vs. U. S., 207 U. S. 425.

Perjury cannot be assigned upon an affidavit before a notary public by pre-emptor of coal land under Sec. 2348, and 2349 of the Coal Land Law.

U. S. vs. Manion, 44 Fed. 800.

As both counts of the indictment are based upon rules and regulations of the Department, both are fatally defective.

III.

These fundamental propositions which are not disputed are especially illustrated and emphasized in the case at bar, in that Congress, in the Public Land Laws, wherever considerations of public policy prohibited pre-contracts of alienation, has specifically enacted the prohibition in *statutes* declaring the form of affidavit and assigning perjury for a violation thereof.

In the coal land statute there is no prohibition of alienation by pre-contract or otherwise, and such prohibition cannot be inferred from any supposed public policy which Congress has failed to enact in a statute.

See Land Statutes of U. S., *supra*, p. 1

On the contrary comparison of the coal land statute with the pre-emption homestead and other public lands shows

clearly that Congress *intended* the free exercise of right of alienation by entrymen by pre-contract and otherwise.

IV.

The Conspiracy statute, Sec. 5440 has been construed in accordance with these fundamental principles, and as there are no common law offenses in the United States, criminal conspiracies are punishable only as such when they are distinctly declared in the statute. There must be a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. It is thus sharply distinguished from conspiracy at common law which has been substantially modified both by judicial decisions and statute in England and in the courts of the several States.

Britton vs. U. S., 108 U. S. 192.

Pettibone vs. U. S., 148 U. S. 197.

2nd Stephens' History of Crim. Law in Eng., 121-127.

2nd Wharton's Crim. Law, 10 Ed. Sec. 1356, *a*, *b* and note.

Wright's History of Criminal Conspiracies (Am. Ed) 6, 68..

It follows that the word defraud in the second clause must be construed in the sense of commiting a fraud made so by Federal Statute.

2nd Wharton's Crim. Law, 10 Ed. 1356a, *b*.

The indictment does not state a case of "defraud" at common law.

Bouvier's Law Dict., "defraud."

7 Cye 123. "cheats."

19 Cye 387, "false pretenses."

U. S. v. Wilson, 44 Fed. 751.

2 Stephens' Hist. of Crim. Law in Eng., 121-127.

V.

The statutory requirement of overt acts in conspiracies against the government is analogous to and taken from the Constitutional requirement in indictments for treason, and this latter has sprung from the dread of constructive treason, and is controlled by considerations of public policy, which prohibit the extension by judicial construction of statutory crimes which are dangerous to liberty.

Const. Art. 3, Sec. 3.
IV. Blackstone Comm., Chap. VI.
U. S vs. Hirsch, 100 U. S. 33.
The Federalist No. XLIII.
2 Curtis' Hist. of Const. 384.
Arguments of Erskine in Gordon, Hardy and Horne Tooke cases.
Coke 3, Inst. p. 23.
Commonwealth vs. Hunt, 4 Met. 111.
Wright's Hist. of Crim. Conspiracy, p. 68.
2 Wharton's Crim. Law, 10th Ed., Sec. 1338 *a. b.*

The conspiracy must therefore be sufficiently charged irrespective of any averment of overt acts, which are merely to afford a *locus penitentiae.*

U. S. vs. Britton, 108 U. S. 192.
Pettibone vs. U. S., 148 U. S. 197.
U. S. vs. Taffe, 86 Fed. 113.

VI.

As the United States cannot be defrauded by the exercise by a citizen's sale of his right of entry and purchase of coal lands when it has not been prohibited by statute, it is not necessary to consider the distinction between frauds at common law and the frauds cognizable in a court of equity, which latter it is said are incapable of definition.

To say that constructive fraud, such as is cognizable only in a court of equity, can be the basis of a criminal prosecution for conspiracy would in effect say that no man could tell whether he had committed a crime until the chancellor had passed judgment thereon.

Thus, the word fraud as used in the bankruptcy act has been held to mean positive fraud involving moral turpitude.

Neal v. Clark, 95 U. S. 704.

The Court there said that it did not include implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.

See also Hennequin v. Clews, 111 U. S. 676.

The term "With intent to defraud" as used in the Federal Statute, means a guilty intent.

See Nat'l Banking Act Sec. 5209 R. S. U. S.
Forgery Statute, Sec. 5421-5423, R. S. U. S.

Impossible to define the equitable conception of fraud.

2 Pomeroy Eq. Jurisp., 873.
Stephens History of Crim. Law, p. 121.

VII.

The right of contract for the conveyance of a property right acquired or to be acquired thereafter, is inherent in the citizen, and cannot be made a crime, or in any wise illegal in the absence of any statutory enactment.

The case of the Trinidad Coal & Coke Co. vs. U. S., 137 U. S. 161, relied upon by counsel, in the court below, is clearly not in point, as this is a criminal action, and even in civil cases in view of the recent decision of the Supreme Court in the case of Adams v. Church, 193 U. S. 510, must be limited to its special facts, and in this latter case the Court distinctly upheld this inherent right of contract.

This is emphasized in the later cases of

Hafemann v. Gross, 199 U. S. 342.
Hartman v. Butterfield Lbr. Co., 199 U. S. 335.
See also U. S. v. Budd, 144 U. S. 154.
See also Myers v. Croft, 13 Wall. 291.

VIII.

The government of the United States, therefore, by the exercise of a citizen of the right of alienation by contract, where, for a consideration, deemed satisfactory to himself, he extinguishes his own right.

See cases, *supra.*

Had Congress intended to prevent the exercise of this right, it would have said so. The specific acts of defendant must be shown to have been clearly forbidden by the statute.

France vs. U. S. 164 U. S. 676.

The cases relied on by counsel, the Curley case, 130, Fed. 1, and Stone case, 135 Fed. 393, are not in point, for the reason that in those cases the conspiracies relate directly to the exercise of governmental functions in public service, and in the protection of lives upon the high seas, and involved the invasion of not violation of specific statutes and were acts in themselves *mala in se* and not *mala prohibita.*

IX.

There is no averment in either count of the indictment that any entryman did not possess the qualifications required by the statute, or that any entryman was disqualified by having already exhausted his right, or that there was any false personation or imposition, or that any statutory requirement was not performed; nor is there any charge that any lands were entered with any misrepresentations or concealment as to the character of the lands. Therefore

the indictment in neither count states any crime under the laws of the United States.

See cases, *supra.*

X.

The second count of the indictment is specifically based upon the statute Sec. 4746, which is distinctly a pension statute and not applicable to the case at bar.

See appendix attached hereto, being an extract from Congressional record. The Court is at liberty to defer to the proceedings in Congress in order to determine the evil sought to be remedied by the enactments of the statute.

Hepburn v. Griswold, 8 Wall. 603.
American Net etc. Co., v. Worthington, 141 U. S. 468-73.
Holy Trinity Church v. U. S., 143 U. S. 457.
Northern Pac. Ry. Co. v. U. S., 36 Fed. 282, 285.
U. S. v. Union Pac. Ry. Co., 37 Fed. 551.
Untermeyer v Freund, 50 Fed. 77-80.
U. S. v. Pattison, 55 Fed. 605, 641.
U. S. v. Wilson, 58 Fed. 768.
U. S. v. Hansey, 79 Fed. 303.

This statute was construed as a pension statute in

Pooler v. U. S., 127 Fed. 509.

See also Edgington v. U. S., 164 U. S. 361, which construed the statute before its amendment.

As shown by the opinion of the Circuit Court, it is immaterial whether this statute is construed as a pension statute or not, as there is no statutory requirement of affidavits in this case, and the only sanction is the rule of the department, the violation whereof cannot be the basis of a criminal charge. (See 11 *supra.*)

XI.

Form and Sufficiency of the Indictment.

The case has thus far been considered upon the question whether any crime is charged in either count of the indictment, and it is submitted that the judgment should be affirmed on this view of the case alone, and this will render it unnecessary to consider any questions relating to the form and sufficiency of the indictment. We assume, however, that as the Act, under which this writ of error is sued out, in no wise limits the jurisdiction of the court, it follows that the Court has the duty, if necessary, of reviewing the whole case.

See Burton v. U. S., 196 U. S. 283.
Williamson v. U. S., 207 U. S. 425.
See also U. S. v. Vitty, 208 U. S. 393, and

U. S. v. McDonnell, 207 U. S. 531 under this Act, where full jurisdiction seems to have been assumed.

There is nothing in the Act of 1907, which limits the jurisdiction of the court in the writ of error to the specific ground of invalidity, whereon the indictment was quashed in the court below. The case, therefore, is not analogous to that of determining a federal question when a writ of error is sued out to a State court and the jurisdiction is limited to the question.

XII.

The motion to quash filed in the court below included these objections on the ground of duplicity and want of certainty in the indictment (Rec., p. 7) together with the point that neither count of the indictment stated a crime. It is immaterial, therefore that motions to quash are ordinarily addressed to the discretion of the Court, and the rulings thereon are not assignable for error. As this case is

brought before this Court under the statute of 1907, it is before the Court for all purposes both as to the crime under the statute and the sufficiency of the indictment in all respects.

XIII.

It is therefore submitted that the indictment irrespective of any other question is defective in both counts in failing to set out any other rules and regulations of the department of the Interior, which are distinctly referred to in both counts as being the basis of the charge of the attempt to defraud the government. Such regulations cannot be judicially noticed when they are claimed to be the basis of a crime. See U. S. v. Bedgood, 49 Fed. 54.

This rule is peculiarly applicable when there are two classes of entries with rules and regulations, and we are left at sea as to what charge we must meet under the two counts.

XIV.

The indictment is also bad in its statement of the *venue* of the alleged crime, in that it places it in both counts on the same day in three different places. The venue must be stated not only to show that the crime was committed within the jurisdiction but to advise the defendant with certainty of the charge against him so that he can properly defend himself. A conspiracy requires an *aggregatio mentium;* though it may be inferred from the circumstances, it must be alleged with precision and definiteness.

1 Archbold Crim. Pl. & Ev. 264.
Jane v. State, 3 Mo. 61.
State v. McCracken, 20 Mo. 411.
State v. Hogan, 31 Mo. 340.
U. S. v. Burns, 54 Fed. 351.
State v. Nickson, 18 Vt. 70.
State v. Cotton, 24 N. H. 143.
Connor v. State, 29 Fla. 455, 465.

The averments of venue in different places within the jurisdiction at the same time makes the indictment bad for uncertainty, as it cannot be told in what place the conspiracy is to be proven; so that *three* distinct conspiracies are alleged in each count.

U. S. v. Marks, 122 Fed. 964.
State v. Roberts, 26 Me. 268.
Commonwealth v. Weller, 162 Mass. 429.
Kane v. State, 18 Tex. 391.

XV.

The indictment is also bad in both counts in failing in the essential requirement of *certainty* in the statement of the scope of the conspiracy. It fails to furnish the accused with a description of the charge against him which will enable him to make his defense, or to protect him against another prosecution, or to determine whether the facts are sufficient in law.

U. S. v. Cruickshank, 92 U. S. 542.
U. S. v. Cook, 17 Wallace, 174.
U. S. v. Hess, 124 U. S. 483.
U. S. v. Post, 113 Fed. 852.
Miller v. U. S., 133 Fed. 341.
U. S. v. Green, 136 Fed. 618.
Haynes v. U. S. 101 Fed. 817.
Bannon v. U. S., 156 U. S., 454.
U. S. v. Marx, 122 Fed. 964.
U. S. v. Simmons, 96 U. S. 360.
Pettibone v. U. S., 148 U. S. 197.
Moore v. U. S., 160 U. S. 270.
U. S. v. Watson, 17 Fed. 145.
U. S. v. Belvin, 46 Fed. 381.
U. S. v. Moore, 60 Fed. 738.
U. S. v. Walsh, 5 Dill. 58.

XVI.

The real gravamen of each count was the alleged unlawfulness of the end of purchasing of the right of entry of party in advance of his entry, the extinguishment of his right of entry for a consideration agreed upon by the parties, an act which has not been made a crime or illegal by nay law of the United States, and the effort is made in both counts to becloud the issue by alliterative, vituperative epithets, calling them "false, feigned, fictitious and fraudulent," so that when these epithets are applied to the same papers it is impossible to find what charge is made or what the defendant is expected to meet.

It is therefore submitted that even if a criminal conspiracy can be based upon the purchase of a man's right of entry of coal lands for an agreed consideration, the offense should be charged in plain and distinct language so that the defendant can know what he has to meet and be protected against another prosecution, and this has not been done in the case at bar.

XVII.

The judgment of the Court below should be affirmed.

ARGUMENT.

I.

Constructive Conspiracy and Constructive Treason.

When the indictment in this case is divested of the cloud of alliterative vituperative epithets, such as, "fictitious," "false," "forged" and "fraudulent" papers, it is clear that the single issue is whether the purchase by a citizen for an agreed consideration from another of his right to make a cash entry of coal land, so that, possessing all the statutory qualifications, the latter makes such entry under a pre-contract to convey the same extinguishing his own right, constitutes, in the absence of any statute penalizing or prohibiting such action, a crime under the laws of the United States.

It is unnecessary to cite authorities declaring the fundamental proposition, which we understand is not controverted, that there were no common law crimes against the United States. Any offense, which may be the subject of criminal procedure in a Court of the United States, must be an act committed or omitted in violation of a public law of the United States either prohibiting it or commanding it. In the language of this Court, in Todd v. United States, 158 U. S., "It is axiomatic that the statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under the statutes unless clearly within its terms. There can be no constructive offense. Before a man can be punished, his case must be plainly and unmistakably within the statute."

In the face of this, in the prosecution of this case the government claims that Sec. 5440 of the Conspiracy Statute, in its second clause, is not limited to frauds declared by statute, or even to what were known as common law frauds, but includes any *constructive* fraud such as would be within the cognizance of a court of equity; and the government

assigns as error (Rec. p. 103) that the District Court erred in omitting to follow and apply the decision of this Court in the Trinidad Coal Company, 137 U. S. 161, a *civil* suit, where it was held that a court of equity could cancel a patent obtained through such pre-contracts of purchase as were held in that suit to constitute an *evasion* of the law; in other words, whatever acts a court may hold to be an evasion of a policy of the government, and thus an interference with this administrative policy, may be adjudged a *crime* under the conspiracy statute as an attempt to defraud the United States.

It was said, in U. S. v. Hirsch, 100 U. S. p. 33, where the court held that an indictment under Section 5440 was subject to the three years' Statute of Limitation, and was not limited to revenue law, though originally enacted to prevent frauds upon the revenue:

> "The conspiracy here described is a conspiracy to commit any offense against the United States. The fraud mentioned is any fraud against the United States. The fraud may be against the coin or to *cheat* the government of its land or other property. The offense against the United States may be *treason*, and persons have been convicted under this statute for a conspiracy to do the acts which are defined to be treason."

As suggested in this opinion, a conspiracy to defraud the government differs from treason against the government in name only. The history of criminal conspiracy in the English common law is closely akin to the development of the law of constructive treason. Thus, Wright, in his History of the Law of Criminal Conspiracy (American Edition p. 6), says that the modern law of conspiracy has grown out of the early doctrine that since the gist of crime was in the intent, a criminal intent, manifested by any act done in furtherance of it, might be punishable, although the act did

not amount in law to an actual attempt. Out of this grew the rule, first formulated in statute in the reign of Edward I, that a combination to commit, or procure the commission of, a crime was criminal and might be punished as a conspiracy. He adds (p. 7) that the *convenience* of this mode of procedure in permitting the convictions of persons without proof of complete crime had already been proved in indictments for treason, citing the cases of prosecutions of Blunt, 1600, Lord Stafford in 1680, and Lord Russel in 1683.

The expansion of this doctrine under the Tudors and early Stuarts was mainly through the Star Chamber until the abolition of that court in 1640. Treasonable conspiracies were a favorite weapon of the government in state prosecutions almost down to modern times. This is clearly shown in the great arguments of Erskine in the treason and conspiracy cases of his time. Thus, in his defense of Lord George Gordon in 1780, he discussed the boundaries of high treason as marked out in the reign of Edward III with a long list of new treasons that have been accumulating in succeeding reigns, and declared that his client could not be guilty of treason unless he had levied war against the King contrary to the plain letter, spirit and intention of the Act of Edward III:

> "To be extended by no new or occasional construction, to be strained by no fancied analogies, to be measured by no rules of political experience, to be judged by no fear, to be determined by the wisdom of no individual, however wise, but to be expounded by the simple genuine letter of the law."
>
> "In nothing therefore is the wisdom and justice of our law so strong and eminently manifest as in the rigid, accurate, cautious, explicit unequivocal definition of what shall constitute this high offense—high treason consisting in the breach and dissolution of that

allegiance which binds society together, if it would be left ambiguous, uncertain or indefinite, all the other laws established for personal security of the subject would be purely useless, since this offense, which from its nature is so capable of being judged of by rules of political expendiency, on the spur of the occasion, would be a rod at will to bruise the most virtuous members of the community, whenever virtue might become troublesome or obnoxious to a bad government. * * * The powers of the State can be but rarely interested in straining laws concerning their subjects beyond their legal interpretation, but if treason, where the government itself is directly offended, were left to the judgment of its ministers, without any boundaries, nay, without the most distinct and invariable boundaries, marked out by law, there could be no public freedom, and the condition of the Englishman would be no better than slave at the foot of the Sultan; since there is but little difference whether a man dies by the stroke of the sabre without the forms of a trial, or by the most pompous ceremonies of justice, if the crime could be made at pleasure by the State to fit the fact that was to be tried."

It was said by Coke (3 Inst. p. 23) quoted by Lord Erskine in his argument in the Hardy case (treasonable conspiracy) in 1794:

"Before the Act of the 25th Edw., the Third, so many treasons had been made and declared, and in such sort penned, as not only the ignorant and unlearned people, but also learned and expert men, were trapped and snared, * * * so that the mischief before Edward The Third, of the uncertainty of what was treason, and what not, became so frequent and dangerous; so that the safest and surest remedy was, by this excellent

> act of Mary, to abrogate and repeal all but only such as are specified and expressed in the statute of Edward The Third. By which law, the safety of both the King and the subject, and the preservation of the common weal, were wisely and sufficiently provided for, and in such certainty that *nihil relictum est arbitrio judicis.*"

This whole doctrine of constructive treason, which was so eloquently denounced by Erskine, was abhorrent to the framers of our Constitution, and hence came the provision, Article 3, Sec. 3 of the Constitution defining treason as the only crime defined in the Constitution, effectually excluding every form of constructive treason, and requiring conviction by the testimony of two witnesses to some overt act or confession in open court.

Curtis (History of the Constitution, Vol. 2, p. 384) says that "the makers of the Constitution resorted to the great English Statute of the 25th Edward III, and from it they selected two of the offenses there defined as treason which were alone applicable to the nature of the sovereignty of the United States."

It is said in the Federalist, No. XLIII (by Madison), concerning this clause:

> "As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it; but as newfangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author."

Blackstone says (Book 4, Chap. 6), that during the period of constructive treasons, no man knew how to behave himself or to do, speak or say for doubt of such pains of treason.

This development of the law of treason is allied closely with the history of common law of criminal conspiracy. The *convenience* of conspiracy as a mode of procedure in prosecutions for treason was illustrated by the prosecutions instituted by the English Government in 1794 at a time when public opinion was thoroughly alarmed by the reign of terror in France, and all agitation for reform was looked upon with suspicion. It was in one of these cases that Erskine made his celebrated arguments in behalf of Mardy, and Horn Tooke, where the parties engaged in agitation for political reform were charged with treasonable conspiracy against the life of the King.

As there are no common law crimes against the United States, the offense of conspiracy must be found in the federal statute. It is unnecessary therefore to discuss the modern history of the law of conspiracy in England and in the States where the common law prevails to show the efforts to adjust the law by judicial construction and statutory amendment to meet the conditions of our modern industrial civilization. Thus, it is well known as a part of the industrial as well as legal history of our time that it has been found necessary in England to amend the conspiracy statute in order to legalize the strikes of workingmen in their efforts to better their conditions.

See 38-39 Vic. c. 86.

See also Conspiracy bill passed by the House in the 57th Congress.

In the leading case of Commonwealth vs. Hunt, 4 Met. Mass. 111, which has been repeatedly cited by this Court, where defendants, working men, were indicted for conspir-

acy, the court in an opinion by Chief Justice Shaw said that although the common law in regard to conspiring was in force in Massachusetts, yet it did not necessarily follow that every indictment at common law for this offense is a precedent for a similar indictment in that State, and that the British Statute of Laborers was not in force in Massachusetts, as not adapted to the circumstances of their colonial condition when the general laws of the Commonwealth were adopted; saying:

> "This consideration will do something towards reconciling the English and American cases and may indicate how far the principles of the English cases will apply in this Court, and will show why a conviction in English cases will not be a precedent for like cases here."

This leading case was cited and quoted from by this Court in the Pettibone case, 148 U. S. 195, where it was said that while courts of the United States have no jurisdiction over offenses not made punishable by the Constitution and laws or treaties of the United States, they resort to the common law for the definition of terms by which offenses are designated. The court thereupon adopted the definition of conspiracy which has been termed Lord Denman's antithesis as made in Jones' case, 4 B. & A. 345, that is, that a "conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means." The court adopts the rule laid down in the Hunt case, that when the criminality of a conspiracy consists in the unlawful agreement of two or more persons to accomplish or promote some illegal or criminal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in

itself criminal, by unlawful or criminal means, the means must be set out.

As the Federal law of conspiracy is statutory, and we look to the common law only for the meaning of the legal terms implied, the scope of the English law on the subject is very much narrowed, as the United States has no general police power, and the offenses denounced by the statute are necessarily limited to conspiracies to commit an offense against the United States or to defraud the United States. This statute deals therefore only with conspiracies against the government. The body of law dealing with conspiracies primarily against individuals, not involved in federal law or right, is necessarily excluded. The general considerations of policy controlling the development of the law of conspiracy, and the construction of conspiracy statutes are proper as showing the trend of legal thought in dealing with this class of offenses.

Wright concludes his History of the Criminal Law of Conspiracy, (See page 68) in saying that the doctrine of the criminality of agreements is subject to the following limitations, that its principal function is that of an auxiliary to the laws creating particular crimes. That while there may be cases in which acts done by several persons in agreement ought to be punished although the same acts ought not to be punished if done without agreement, that they ought to be "specific and carefully defined." He conceives that in an imperfect system of criminal law the doctrine of criminal agreement for acts not criminal may be of great value for the punishment of the persons for acts which ought to be made punishable irrespective of agreements, and especially for some kinds of fraud, but he says that this use of the doctrine involves an important delegation of legislative power in a matter in which the exercise of such power ought to be "carefully guarded," since the legislature admits its own inability to discover the principles on which legislation ought to proceed.

This view of the *public danger* of the extension by judicial construction of the criminal law of conspiracy, particularly in offenses against the government, to which Sec. 5440 is limited, is also taken up by Wharton in his Commentaries on American Law, from which we quote, also quoted by Carson in his American Edition of Wright's History of the Law of Criminal Conspiracy: (See Wharton Crim. Law, 10 Ed., Sec. 1338)

> "But to extend indictable conspiracies so as to include cases where acts in themselves not indictable are attempted by concert, involving neither false statement nor concerted force, should be *resolutely opposed*. A distressing uncertainty will oppress the law, if the mere fact of concert in doing an indifferent act be held to make such act criminal. We all know what offences are indictable, and if we do not, the knowledge is readily obtained. Such offences, when not defined by statute, are limited by definitions, which long processes of judicial interpretation have hardened into shapes which are distinct, solid, notorious and permanent. It is otherwise, however, when we come to speak of acts, which though not penal when they are committed by persons acting singly, are supposed to be so when brought about by concert which involves neither fraud nor force. These there has never been any judicial attempt to define or legislative attempt to codify. No man can know in advance whether any enterprise in which he may engage cannot, in this way, become subject to prosecution. It is essential to the constitution of an indictable offence, as is elsewhere shown, that it should be prescribed either by statute or by Common law; but conspiracies to commit by non-indictable means non-indictable offences, if we resolve them into their elements, are neither proscribed by Common law nor by statute. By force of their definition their ob-

ject is not *per se* proscribed, and the other ingredient in their constitution, that of an association of individuals to effect a common end, is essential to all actions in which two persons engage. When we remember also that, as we have seen, it is necessary to a righteous administration of public justice that punishment should be attached only to acts which are made penal by rules which are pre-announced and constant, the objection just stated acquires additional weight. An act of business enterprise in purchasing goods in a cheap market for the purpose of selling them in a dear market, which in one phase of judicial sentiment would be regarded as a meritorious impetus to commercial activity, would be, in another phase of judicial sentiment, as it once has been treated, an indictable offence. Legislative and judicial compromises which one Court may view as essential to the working of the political machine, another Court may hold to be indictable as a corrupt conspiracy. Nor can we continue to accept the risks by which this undefined extension of conspiracy has been justified. It used to be said that the combination of a plurality of persons to do an act invests it with a criminality which it does not otherwise possess. Undoubtedly this is so with riot, which depends on tumult, which again depends on plurality of agents, but riot is positively defined by law, and all who engage in a riot have the means to know what it is, and that it is punishable. But can this be predicated of combinations which the law does not in advance pronounce to be unlawful? One of the two alternatives we must here accept; either we must, with the old English judges, look upon all voluntary combinations as suspicious and objects of judicial suppression, or we must declare that *only such combinations are penally cognizable as are made so either by statute or by a settled judicial construction of the Common Law.*

> "The conclusion is that: 1st. The offence of conspiracy at Common law is limited to confederacies to effect illegal objects as ends or means. 2d. Confederacies to pervert public justice or unjustly to affect the body politic, and 3d. Confederacies which, from the mode of their operation, exhibit the features of various false devices and tokens, or an aggregation of violence likely to overbear individual resistance and to produce public terror. And this is virtually saying that in the first case, the confederacy is unlawful because it is a cheat at Common law, and the second, because it is an attempt to obstruct justice, and the third case, because it is an attempt at riot."

With this view that the undefined law of conspiracy, particularly conspiracy against the government, is dangerous to liberty, Wharton says of this Sec. 5440, (See 2 Vol. 10 Ed. 1356a).

> "Offenses against the government of the United States in the first clause must be regarded in harmony with the rule that the United States has no common law jurisdiction, and as limited to offenses against the United States made so by statute. In the second clause the word *defraud should be construed in the sense of committing a fraud made so by federal statute.*

In this connection attention should be called to the criticism by Wharton (see Vol. 2, p. 208) of the opinion in the case of U. S. v. Gordon, 22 Fed. 250, sustaining an indictment for conspiracy to defraud under the pre-emption law, where the first count, charging simply that the defendants conspired to defraud the government out of certain lands, was held good. He says:

> "There are multitudes of frauds which are not indictable when the party injured is a private person, e. g., not giving up by an officer of a due amount of time

to his employer, or craftily shirking duty, or telling falsehoods by way of puff or evasions, and these frauds do not become indictable because the party injured is the government. And aside from this objection, which by itself should be fatal, the ruling before us is in conflict with the position that in an indictment it is not enough to charge a conclusion of law. (See Wharton's Crim. Pl. & Pr., Sec. 221 and cas. cit.).

"In conspiracy it should be remembered the farthest limits to which the courts have gone, has been to sustain a charge of conspiracy to cheat by false pretenses, cheating by false pretenses being a statutory offense. Again, the ruling before us is open to the objection of disregarding the principle that the federal courts have no common law jurisdiction. So far as concerns cheats by more than one person, all that would be necessary to give federal courts jurisdiction, if the view here contested be true, would be to charge a conspiracy, and this would give these courts jurisdiction even beyond the limits of the common law. U. S. v. Walsh, 5 Dil. 58."

"The exceptions above stated do not apply (to) the ruling of the Court in the same case sustaining a count charging a conspiracy to defraud the United States by presenting for approval to the register and receiver of the land office false, and fraudulent affidavits and proofs of settlement and improvements under the preemption law, stating that such persons were entitled to enter public lands and severally complied with the preemption laws, and had severally entered lands for their individual benefit."

(Such affidavits are specifically required by the preemption acts. See, *supra*, p. 11.)

"Nor can exception be taken to the ruling sustaining a count to charge a conspiracy to defraud the United

> States by hiring twenty-eight persons to enter at a land office under color of the pre-emption laws certain public lands in the United States, solely for the purpose of selling the same on speculation to defendants and L. and some other persons to the grand jury unknown, is not demurrable." (Under the pre-emption law such entry involving false affidavits is penalized by the statute.)

In the indictment in the case at bar (Rec., p. 4) it is charged that the alleged conspiracy was not only to defraud the United States out of its valuable property in coal land, but also "of its governmental function in the matter of preserving and disposing of the said lands, as well as of its right to administer an intelligent service in that behalf in the interest of the people of the United States." Thus the term "defraud" is used not only in its common law sense of obtaining property by cheating, but in a broader sense of interfering with what may be adjudged to be an "intelligent and honest service of the government" in behalf of the people. This broad language seems to have been taken from the opinion of the Court in Curley v. U. S., 130 Fed. 1, where the Court of Appeals, 1 Circuit, in affirming a conviction under Sec. 5440, in what probably amounted to a common law fraud as well as a violation of a specific statute, Sec. 5418 by the false impersonation at a civil service examination, used the language which must be construed in relation to the case before the Court:

> "It did not necessarily follow that because the word 'defraud' used in the statute for the protection of the individual rights, will be construed as having reference to property interests, that the word 'defraud' as used in the statute and intended for the protection of the government, and its wholesome administration of its affairs in the interest of the great body of the

> people, has reference solely to property and pecuniary interests."

It is easy to see how such language can be distorted so as to include whatever policy a dominant party might deem prejudicial to the "intelligent and honest service" of the government for the people, as in England the government in 1794 deemed an agitation for parliamentary reform a covert attack upon the security of the government itself, and thus a "treasonable conspiracy."

It is true that the constructive treason which was sought to be reached under these prosecutions of conspiracy related to the form of administering the government, and not to what may be termed the property rights of the government, but the theory of the present indictment involves the same danger to public liberty as, in the words of Blackstone, "no man would know how to behave himself, or what to do, speak or say" for doubt of the judicial construction which will hold him guilty of a conspiracy against the government. This public danger is illustrated in the fact, not disputed, that for some thirty-five years the Interior Department and Land Office and public prosecutors have recognized as lawful acts which are assailed by this indictment for conspiracy. The only protection to the citizen is found in the rigid adherence to the fundamental rule repeatedly affirmed by this Court that statutes creating and defining crimes cannot be extended by judicial construction. As said by this Court in U. S. v. Brewer, 139 U. S. 278:

> "Laws which create a crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. Before any man can be punished his case must be plainly and unmistakably within the statute."

This principle was happily phrased by Judge Dillon in U. S. v. Clayton, 2 Dill. 219, where the indictment in what

was in effect a political prosecution against Gov. Clayton of Arkansas, and in a time of intense political excitement, for alleged violation of the Federal election law, in giving a certificate of election:

> "It belongs only to the legislative department to create crimes and ordain punishments. Accordingly courts, in the construction of statutable offense, have always regarded it as their plain duty continuously to keep clearly within the expressed will of the legislature, less otherwise they shall hold an act or an omission to be a crime and punish it, when in fact the legislature had never so intended. If this rule be violated, says Chief Justice Best, the fate of the accused person is decided by the arbitrary discretion of the judges and not by the express authority of the laws."

II.

The Rules of the Land Department.

As there is nothing in the coal land statute prohibiting the exercise of the right of alienation, either by pre-contract or otherwise, and no provision for any form of affidavit, though such are specifically provided in other public land laws, the effort was made in both counts of the indictment to supply the essential basis of a criminal prosecution by reference to the rules and regulations of the land office. Reference is made to the "declaratory statements, applications of entry, powers of attorney, non-mineral affidavits, and affidavits of purchase" to be filed with the register and receiver of the land office under the requirement of such rules and regulations (Rec., p. 3), and these are the papers which are denounced by the alliterative epithets as "false, fictitious, feigned, forged and fraudulent." So far as the indictment is concerned we are left to speculate as to what these rules and regulations are, or as to what

specific rules or regulations required the papers alleged to be "false, fictitious, forged and fraudulent."

It was held in United States v. Bedgood, 49 Fed. 54, in an indictment for perjury in making final proof under the pre-emption law, that the Court could not take judicial notice of the rules and regulations of the land office, whether they were prescribed by the secretary of the Interior or by the Commissioner, and they must be pleaded in the indictment if any support was sought therefrom. The Court said that the Act of Congress Sec. 2478, conferring on the land department the authority to enforce and carry into execution the provisions of the law relating to the public land not otherwise specially provided for, did not meet the difficulty. Whenever such regulations contribute in any manner to the basis of any crime, they must be distinctly set forth in the indictment.

Especially is this the case when, as in the case at bar, it appears from the statute that there are two classes of entries wherefor distinct rules and regulations may be made, and we are therefore left entirely at sea as to what we must be prepared to meet under the two counts of the indictment. But if the rules and regulations in force at the time of the entries complained of, had been set forth in the indictment, it would have been fatal to the case of the prosecution. The entries set out in the forty overt acts of the two counts were all cash entries, and it is clear from the averments of the body of the indictment, cloudy as they are, that none other than *cash entries* were included within the scope of the alleged conspiracy. The form of affidavit prescribed by the land office regulations, which were in force at the time of the making of the entries, and which had been in force for years prior thereto, contains *no reference whatever to pre-contract.* It follows, therefore, that under such form of affidavit the entrymen could truthfully make such affidavit, and that it would not be false in any sense nor open to any of the alliterative epithets of the indictment.

It is true that the courts take judicial notice of the rules and regulations of the executive departments of the government prescribed by authority of law, that is to say, it is not necessary to formally introduce such rules and regulations in evidence as held in the case of Caha v. U. S., 152 U. S. p. 212. This position is clearly distinguishable from the requirement of *pleading* such rules and regulations, when they are claimed to be material and constitute a criminal charge in an indictment.

The question in the present case is not one of evidence or pleading. It lies deeper. If there was a rule applicable, it could not be invoked without the authority of a *statute* to make out a crime. This question was settled beyond controversy in the Eaton case, 144 U. S. 677, relied upon by the Court below, and which is really conclusive of the case at bar, as to both counts of the indictment. The Court there said that regulations prescribed by the President and by the heads of departments under authority granted by Congress may be regulations prescribed by law, as lawfully to support acts done under them, and of course must have in a proper sense, the force of law, but it does not follow that a thing required by them is a thing required by law, so as to make the neglect to do a thing a criminal offense in the citizen, and where the statute does not distinctly make the neglect in question a criminal offense.

In the case at bar the statute so far from providing for an affidavit, does nothing of the kind. The only authorization of the rules is that contained in the last paragraph of the coal land act, Sec. 2357, where the Commissioner of the general land office is authorized "to establish all rules and regulations for carrying into effect the provisions of this and the preceding sections."

This ruling in the Eaton case was re-affirmed in the recent case of Williamson vs. U. S., 207 U. S. 425, where the plaintiff in error was convicted on indictment charging con-

spiracy to commit subordination of perjury under the Timber & Stone Act. (See *supra*, p. 13) the judgment of conviction was reversed and the cause remanded because of the error of the trial court in admitting evidence of the falsity of the statements under the *final proof* of the entryman, and in effect charging that the sworn statements made at the time of final proof concerning the purpose for which the land was sought to be purchased, etc., would constitute perjury, if the oath so taken, though not expressly embraced in the statute, was required by a regulattion of the commissioner of the general land office. The Timber and Stone Act prescribed the form of the indictment in the original entry (see *supra*, p. 13), but made no such requirement in the case of final proof. The statute did however provide in Sec. 3 "that effect shall be given to the foregoing provisions of this act by regulations prescribed by the Commissioner of the general land office." The court held following its ruling in Adams vs. Church, 193 U. S. 510, construing the Timber Culture Act, that this ruling was fatally erroneous. It was insisted on behalf of the government that there was a difference between the Timber Culture Act and the Timber & Stone Act, in that a long time had lapsed and much was required to be done by the applicant, but the court said that was for the consideration of Congress, and added:

> "It remains only to consider whether it was within the power of the Commissioner of the General land office to enact rules and regulations by which an entryman would be compelled to do that, at the final hearing, which the act of Congress must be construed as having expressly excluded, in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it.
>
> As observed in Adams v. Church (p. 517): "To sustain the contention * * * would be to incorporate

> * * * a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject." True it is that in the concluding portion of section 3 of the timber and stone act it is provided that "effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office." But this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."

The Court therefore held that the admission of the final proof as evidence tending to show an alleged illegal purpose in the original application was fatal error.

Both counts of the indictment in this case are based upon the rules and regulations of the department. It is clear, therefore, that under the decisions in the Eaton and Williamson cases, irrespective of all other questions, both counts of the indictment are bad, as both are predicated upon an alleged falsity in affidavits which are not required by any statute, but only, if at all, by rules and regulations of the department.

III.

The Public Land Policy of the United States.

While the indictment has no warrant in any statute of the United States, or in any rule or regulation of the Land Department, even assuming the same to have been pleaded, and to have the force of law, which it clearly had not, it is alike wanting in any support in the declared *policy* of the

United States in the disposition of its coal and other public lands. It is well said by the learned District Judge: (Rec. p. 16)

> "When the coal land Act was passed little was known of the locality and extent of coal measures in this western country; and if we were permitted in this case to seek out for a policy in that act, we would say that the predominant one was to introduce the discovery and development of such deposits."

But when the coal act is studied, its contrast with the preceding and contemporaneous statutes, wherein the government provided for the disposition of its public lands other than mineral lands, is clear and distinct. Thus the original pre-emption act of 1841 required an affidavit of the pre-emptor "that he had not settled upon or improved the land to sell the same or speculate, or to appropriate the same to his own exclusive use; that he had not directly or indirectly made a contract with any person by which the land should enure in whole or in part to any one except himself." (See *supra*, p. 10). This requirement was repeated and emphasized in subsequent amendments of the pre-emption act, also in the original homestead act of 1862 (see *supra*, p. 12), and its successive amendments; in the Timber Culture Land law (*supra*, p. 15), in the Timber and Stone Act (*supra*, p. 13), in the Desert Land law (*supra*, p. 16), in the Oklahoma Land Laws (*supra*, p. 16). It will be seen that the pre-emption act and homestead act were passed prior to the passage of the coal land statute. It is obvious that the land laws providing for the sale of coal lands were framed as analagous to the mineral land laws, rather than to the public lands of the United States. Mineral deposits, including coal, require combination and capital for their development, while the provisions for the entry of land under the pre-emption and homestead acts look to the settlement of the country and

cultivation of the land by the individual entrymen. But when Congress came to frame the coal land statute in 1873, these carefully prepared prohibitions of pre-contracts of alienation were studiously omitted. Sec. 2347 provides that every person under the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above should have a right to enter any quantity of vacant coal lands of the United States not otherwise appropriated, not exceeding 160 acres, to such individual persons and such association, etc. This section provides for cash entry, while the three succeeding sections provide for preferential rights of entry. In none of the sections is there any prohibition of restraint on alienation by pre-contract or otherwise, much less is there any form of affidavit or any penalizing prescribed. The only limitation is of quantity, so that the individual entryman is limited to 160 acres and the association to 320 acres, while the preferential entryman association, in spending money under certain conditions may enter 640 acres. Not only is there no hint in this statute of any prohibition of, or even of any policy against, alienation by pre-contract or otherwise, but the contrast with the pre-emption and homestead acts, with which Congress was familiar, wherein such alienation was carefully prohibited, is the strongest possible evidence that Congress *intended to leave the way open for the exercise by a citizen of his inherent right of alienation;* so that capital might be provided by concerted effort in the opening of these vast mineral resources of the western country.

This intent of Congress is further emphasized in the coal land statute in the *price* required to be paid for the land; *ten* dollars per acre where the land is ~~not~~ more than fifteen miles from any completed railroad, and not less than *twenty* dollars per acre where the land is within fifteen miles of such road. The price required to be paid for mineral lands

is five dollars per acre, irrespective of location, while the original price for entrymen under the pre-emption act was one dollar and twenty-five cents per acre, and under the homestead act nothing is paid for the entry upon the one hundred and sixty acres other than the fees fixed by the act. In these cases the Government sells for a nominal price, or gives the land in consideration of the obligation assumed by the citizen in building his home and opening the land by settlement and cultivation. In the coal lands, however, the government on the one hand exacted no obligation of the citizen in the cash entry, but on the other hand, the act did exact the *full cash value* of unimproved coal lands; that is, ten and twenty dollars according to their distance from transportation.

The coal land act, it is true, gave the individual citizen his opportunity, if he saw fit to exercise it, of making his entry, but it did not restrain his right of alienation, whether before or after he made his entry. Having once entered his right to make another entry was lost. In any case, by the exercise of his right, he extinguished his right which the law opened to him. The coal land statute, therefore, is framed after the analogy of the mineral statutes, and in sharp contrast with the policy declared in the public land statutes, the coal and the other statutes of the United States, having none of the carefully prepared provisions against alienation by pre-contract, which are so peculiar a feature of the public land statutes.

So far as the policy of the government is concerned, and waiving for the time the requirement that a statutory crime must be declared in the statute, the government might be defrauded in this sense by the entry of a disqualified person, that is, one who was not a citizen, or one who had lost his right by a prior exercise or by one who was under the age of twenty-one, as these were all statutory qualifications for a cash entry under Sec. 2347. The government, however,

could *not* be defrauded by the entry of a citizen after he had made a pre-contract for the transfer of his right any more than it can be defrauded by the exercise by an entryman of his admitted right to convey his interest *after* his entry is made. The effect is the same in both cases; that is, the land is acquired by the purchaser. The law does not presume restraints upon alienation, and they must be distinctly declared in the statute if they are to be enforced by the courts. This principle applies as much to a pre-contract of alienation as to the transfer of an acquired right.

This distinction in what may be termed the legislative policy of Congress is shown in the *affidavit law*, R. S. 294, amended by Act of March 11, 1902, supra. This statute provides that all "affidavits, proofs and oaths of any kind whatsoever, required to be made by applicants and entrymen, under the *Homestead, Pre-emption, Timber Culture, Desert Land and Timber and Stone Acts*, may in addition to those now authorized to take affidavits, etc., be made before any United States Commissioner. This provision for regulating the taking of such affidavits, was thus limited to the cases wherein Congress made affidavits necessary and none other. *The affidavits in coal land cases were not named in the statute for the obvious reason that no provision had been made by statute for the making of such affidavits.*

In this connection, it should be observed that this Court has consistently refused to enlarge by intendment the provisions of the public land laws, prohibiting or restraining alienation. Thus, the Pre-emption Act of 1841 was construed in Meyers v. Croft, 13 Wall 291, as forbidding the assignment or transfer of the right of pre-emption secured by the Act, but did not prevent the pre-emptor from selling his land *after* the entry and before the issue of the patent. The Court said if it had been the purpose of Congress to attain the object contended for, it would have declared the land itself inalienable until the patent was granted.

In United States v. Budd, 144 U. S. 154, the Court construed the prohibition against alienation in the Timber and Stone Act of June 3rd, 1878, *supra*, p. 13, in a suit in equity brought by the United States to set aside a patent for land for alleged fraud. The Court said the act did not in any respect limit the dominion which the purchaser had over the land after its purchase from the government, or restrict in the slightest his power of alienation; *all* that it denounces is a *prior* agreement, acting for another in the purchase. If, when the title passes from the government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied. The Court said further that a man might go through the vicinity and make known his willingness to buy timber, and parties knowing the offer might go and make entries expecting to sell to him, and it would not constitute a violation of the act.

In Adams v. Church, 193 U. S. 510, the same construction was made of the Timber Culture Act (*supra*, p. 15), where the Court held that the policy of this act could not be deemed to have been violated by an agreement by one who had made entry thereunder, to convey his claim to a proposed partner as soon as he had acquired title from the government, in view of the *failure of that act to require*, as in the case of homestead entries, that the entryman shall make affidavit before final certificate, that no interest in the land has been alienated.

So, in the recent case of Williamson v. U. S., *supra*, the Court, in construing the Timber and Stone Act, said that it required an affidavit only in the original entry, not in the final proofs. It is thus clearly shown that there is no policy of the law which requires any straining by intendment of the express provisions against alienation incorporated in the different public land acts. *A fortiori*, the Court will not imply such a prohibition where the law-maker has expressly declined to make one, in order to sustain a criminal prosecution under the Coal Land Act.

In this connection we may refer to the case relied upon by the prosecution, Trinidad Coal Co. v. U. S. 137, U. S. 161, as it is assigned as error that the Court did not apply and follow that decision. It will be sufficient to say as said by the Court below, that this case cannot be carried into the domain of criminal jurisprudence for the purpose of defining the meaning of the word defraud as the basis of the indictment. This case was decided on demurrer to a bill which contained averments, which of course were taken as true, that certain entrymen were disqualified by reason of prior entries, and that the company was disqualified as an association by the prior entries of its members. While this case does not require the questioning of the decision in the Trinidad case, we submit that under the subsequent decisions of the Bud case, *supra*, and Adams v. Church, *supra*, both civil suits, it must be limited to its special facts.

There is nothing in the case of Hyde v. Shine, 199 U. S. 62, cited in the Court below, which at all militates against the force of the cases above cited. In that case, which involved the removal of a party under an indictment of another State for a conspiracy alleged to have been committed there, the indictment alleged fraudulent practises through entries in the names of fictitious and disqualified persons, and the use of forged affidavits and other papers.

IV.

What is a Conspiracy to Defraud the United States.

If the positions we have thus far endeavored to sustain are correct, there can be no criminal conspiracy to defraud the United States in the absence of any statute penalizing or prohibiting the exercise by a citizen of his right of alienation by pre-contract of his right of entry of coal land, when the entryman is possessed of all the statutory qualifications, and the compensation fixed by the case is paid in such entry.

We go further and say that a criminal prosecution cannot be based upon the exercise of such right, even if it could afford the basis of a civil suit for cancellation of the patent by reason of the non-disclosure of such pre-contract to the officers of the government at the time of the entry. The crime under the statute cannot be enlarged by intendment to the broad and indefinable confines of the jurisdiction of a court of equity in cases of fraud.

The statute Sec. 5440 which is the basis of the indictment, was compiled from Sec. 30, Act of March 2, 1863, entitled an Act to amend existing laws relating to internal revenue and for other purposes. In the compilation the phrase "in any manner" is changed to read, "in any manner or for any purpose." While the manifest purpose of the original act was to prevent and punish frauds on the revenue, it has been construed as including those cases of conspiracy to defraud the United States. Conspiracy is an infamous crime within the meaning of the Constitution of the United States.

See Maeckin v. U. S., 117 U. S. 348.

In determining the meaning of the word "defraud" as used in this act, we must exclude from consideration the cases of indictment for conspiracy based on the Pre-emption, Homestead, Timber and Stone and other acts, which contain specific requirements of affidavits, with penalties for false swearing. Such cases are obviously conspiracies to "commit offenses against the United States," and usually involve subornation of perjury, as in the Williamson case, *supra.*

Neither is it necessary to review the cases which constitute actual fraud upon the revenue. These were the cases to which the statute was originally applied, cases involving false personation, and the procurement of a pension, such as Adler v. U. S., 49 Fed. 736, or the destroying of invoices on imported merchandise. U. S. v. DeGrieve, 16 Blatch. 20. These are obviously cases of common law fraud.

It was held by Wharton, supra, p. 52, that the word "defraud" in this statute should be construed in the sense of committing a fraud made so by Federal Statute. If we turn to the common law for the meaning of the word defraud, in indictments for conspiracy to defraud, we can find no basis for extending it beyond what were known as cheats or the use of a false device or token, and such offenses as are discussed by Wharton and quoted by the learned Judge of the Court below in his opinion.

> "In the list of cases which he (Wharton) thus classifies as falling under this head, we find none bearing any similitude to the crime here sought to be charged. I think it may fairly be concluded from what that and the other authors on criminal law says, as well as from the adjudicated cases, that in such conspiracies the ends intended by the conspirators must necessarily involve moral turpitude of the basest sort, in the results, if successful, such as threatening the health of a large body of people by the sale of impure food, or in some instances even life. The latter kind is aptly illustrated in U. S. v. Stone, 135 Fed. 392.

In the Stone case, cited by the Court, the defendants were acquitted on trial, having been charged with conspiring to insert pieces of metal in life preservers furnished to steamers in the coast service, which were under the law compelled to provide such equipment. The Court in this case followed Curley v. U. S. 130 Fed. 1. In the latter case, the conspiracy involved a false impersonation at a civil service examination, and in one of the counts this was charged to be an offense against the United States, that is, presenting false writings to the officer of the United States. The Court held irrespective of the statute (R. S. 5418) that the crime interferred with the operations of the government, and therefore constituted "defrauding" within the meaning of the act.

It is obvious that in these cases the acts alleged were *mala in se* as distinguished from *mala prohibita,* and involved moral turpitude, and clearly evaded if not violated the statutes of the United States. The frauds in these cases were therefore really made so by federal statute within the limits of the definition of Wharton.

The word "defraud" is clearly used in its primary common law sense; and the only sense in which it was ever used as the basis of common law prosecutions, of withholding from another what is justly due him or depriving him of a right by deception or artifice (Bouvier's Law Dict.); and this implies moral turpitude. The term "with intent to defraud" is used in a number of federal statutes such as the National Banking Act, Sec. 5209, the forgery statute, Sec. 5421; also as to the use of the mails with intent to defraud individuals, Sec. 5480. In all these statutes the term is obviously used in a sense involving moral turpitude, intentional wrong doing and dishonest conduct; in other words, *mala in se.*

The construction of the term "fraud" as used in the 33rd section of the Bankrupt Law of 1887, providing that no debt created by the fraud or embezzlement of the bankrupt, etc., is significant in this connection. The word "fraud" as here used has been held to mean positive fraud, involving moral turpitude, or intentional wrong and not implied fraud or fraud in law. See Neal v. Clark, 95 U. S. 704. Also Hennequin v. Clews, 111 U. S. 676. In the latter case, it was held that a discharge in bankruptcy would be good against a debt arising from the appropriation by the bankrupt to his own use of securities deposited with him for the payment of money.

The Court said in this case:

> "It is evident that the English courts regard many transactions as fraud or breaches of trust which we

> don't held to be such under our bankrupt acts. Perhaps the liberal construction made in favor of the certificate of discharge in this country is due to the peculiar modes and habits of business, prevailing among our people."

It is therefore clear that the word "defraud" cannot be enlarged by construction beyond the meaning of the term at common law to include what a chancellor might hold to be constructive fraud or fraud in law. Such a construction would be without precedent and repugnant to common reason.

It is the very essence of a crime that it must be capable of a precise definition in a statute. Certainly this is so in the criminal law of the United States, where common law crimes are unknown, and, as this Court has repeatedly declared, no act, however wrongful, can be punished under a statute unless clearly within its terms. On the other hand, it is the fundamental rule of equity that the equitable conception of fraud is *incapable of definition.* The courts of equity must be prepared to administer relief in the infinite complications of human affairs whenever their jurisdiction is properly invoked.

Pomeroy, in Equity Juris., p. 873, as to the impossibility of defining the equitable conception of fraud, says:

> "It is utterly impossible to formulate any single statement which shall accurately define the equitable conception of fraud, and which shall contain all of the elements which enter into that conception; these elements are so various, so different under the different circumstances of equitable cognizance, so destitute of any common bond of unity, that they cannot be brought within any general formula. To attempt such a definition would therefore be not only useless, but actually misleading."

In Stephen's History of the Criminal Law in England, 2 vol. p. 121, it is said:

> "That there has always been a great reluctance on the part of lawyers to attempt to define fraud, and this is not unnatural when we consider the number of different kinds of conduct to which the word is applied in connection with different branches of the law, and especially with the equitable branch of it. I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words, 'fraud,' or 'intent to defraud,' or 'fraudulent,' occur in the definition of a crime, two elements at least are essential to the commission of the crime; namely, first, deceit, or intention to deceive, or in some cases mere secrecy; secondly, either actual injury or possible injury, or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy."

Both counts of the indictment in the case at bar, therefore, would have been bad at common law, as the allegations would be insufficient to make a case of common law fraud by cheating or false pretense.

Although there is in this case neither a statutory prohibition nor a policy of the United States, much less any penalty, yet even if we concede, for the sake of argument, that there was here an attempt to *evade* a statute, we would still be without the first basis of a criminal prosecution in that it is not the evasion, but the *violation* of a statute, which falls within the domain of the criminal law.

Thus in France v. U. S., 164 U. S. 676, there was an indictment under this statute for an alleged conspiracy under Sec. 5440, to violate the act of Congress passed for the suppression of the lottery traffic in interstate commerce.

The Court held that the paper which contained nothing but figures relating to a drawing already completed, was not a "paper representing a ticket or interest in a lottery" within the meaning of the act. The Court said:

> "The statute does not cover the transaction and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a *narrow* one, yet the statute being *highly penal*, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. * * * If it be urged that the acts of this plaintiff in error are within the reason of the statute, the answer must be that it is so far outside of the language that to include it in the statute would be to legislate and not to construe legislation."

The same ruling was made by the Supreme Court of Missouri in an analogous case, where the legislature had enacted a law for the suppression of "book making" on race tracks. The Court held in State v. Oldham, 200 Mo. 538, that the device of a telephone wire, with a transmitter and receiver, did not constitute an "instrument or device for registering bets" within the meaning of the statute. The Court said that the device was a perfectly obvious trick or subterfuge but the question was not whether the defendant had successfully *evaded* the statute but whether he had *violated* it.

To the same effect is Davis v. Stevenson, 24 L. R. Q. B. 529.

The offenses in these cases, if not *mala in se* were clearly *contra bonos mores*. The prosecution failed because the cases were not covered by the criminal statute. In the case at bar the act is neither a *malum in se* nor does it involve any fraudulent devices, and defendant can not in any possible sense be held to have attempted to defraud the United States, within the meaning of the criminal statute.

V.

The Second Count of the Indictment.

What we have said in the preceding pages applies to the second count of the indictment as well as to the first. Both counts relate to cash entries under Sec. 2347. The second count differs from the first, however, in that it would seem to base the prosecution upon the first clause of Sec. 5440, that is, the committing of an "offense against the United States." This "offense" is sought to be based upon Section 4746 R. S., and it was claimed in the court below that the acts charged in this count brought the case within the terms of this section. This section 4796, reads as follows:

> "That every person who knowingly or willfully (makes or aids, or assists in the making) or in any wise procures the making or presentation of any false or fraudulent affidavit, declaration, certificate, voucher or paper, or writing purporting to be such, concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions (or of the Secretary of the Interior), or who knowingly or willfully (makes or causes to be made, or aids or assists in the making, or) presents or cause to be presented at any pension agency any power of attorney, or other paper required as a voucher in drawing a pension, which paper bears a date subsequent to that upon which it was actually signed or acknowledged (executed) (by the pensioner, and every person before whom any declaration, affidavit, voucher, or other paper or writing to be used in aid of the prosecution of any claim for pension or bounty land or payment thereof purports to have been executed, who shall knowingly certify that the declarant, affiant, or witness named in such declaration, affidavit, voucher, or other paper or writing, personally

appeared before him, and was sworn thereto, or acknowledged the execution thereof, when, in fact, such declarant, affiant or witness did not personally appear before him or was not sworn thereto, or did not acknowledge the execution thereof), shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term of not more than five years."

The section was amended to read as above by the Act of July 7th, 1898, 30 Stat. L. 718, and the section originally read without the matter enclosed in parenthesis, the amendments being the matter within the parenthesis. This section, before its amendment, was before the Court in Edgington v. U. S., 164 U. S. 361, and after its amendment in Pooler v. U. S., 127 Fed. 509, was construed as applicable only in pension matters. The learned judge of the court below was clearly right in his conclusion that under familiar rules of construction, the amended section must be taken as applicable only to pension matters or claimed for bounty lands before the commissioner or secretary.

This view was confirmed by reference to the Congressional Record, Vol. 31, part 4, pages 3025 to 4032, 55th Congress, Second session (S. P. 3866) and also to the Debate in the Senate, Vol. 31, Part 7, pp. 5937 to 6808 same Congress (pp. 6603-04) for the debates in the two houses of Congress on the passage of the amendments.

This section must clearly be construed to apply to pension matters, because, first, it is an amendment of the Pension Statute; second, it is entitled a Pension Statute, and so considered by Congress at the time the amendment was passed; third, there is a general statute covering the crime (see Sec. 5418) under the title of "Crimes." But even if this section should be construed as applicable to other than pension matters, the words "within the jurisdiction of the Secretary of the Interior" clearly mean when that jurisdiction is in-

voked in the manner provided by law. In the language of the court below, to hold "that the Secretary had jurisdiction over the matters charged in the indictment would be to liken jurisdiction in its legal sense to jurisdiction in its political sense, which cannot be done under this statute."

But further discussion of this subject is unnecessary in that the entries to the coal land complained of in the indictment were made under Section 2347 which *does not require of any of the entrymen any of the affidavits, certificates, papers or writing complained of in the second count of the indictment.* As held by the court below, therefore, to hold that the second count charges an offense would be in direct conflict with what was said in the Eaton case and, we may add, to what has since been said by this court in the Williamson case. It is wholly immaterial, therefore, whether Sec. 4746 applies to this case or not.

VI.

The Indictment Bad For Uncertainty and Duplicity.

Under the Act of March 2nd, 1907, the writ of error brings up the whole case and not the single question concerning the invalidity or construction of the statute. We assume therefore that there is nothing to limit the jurisdiction of the Court in the determination of the correctness of the judgment below, and therefore the whole case is to be reviewed.

Burton v. U. S., 196 U. S. 283.
Williamson v. U. S., 207 U. S. 424.

These cases were not brought to this Court under this statute, but as the jurisdiction of the Court attached it was held to extend to the whole case. In the Court below in this case not only were the objections that no offense was charged in the indictment, but also the sundry objections to

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the indictment for duplicity and want of certainty were presented and argued with the motion to quash by all the defendants. See Rec. p. 47-9.

It is true that it has been held that motions to quash are ordinarily addressed to the discretion of the Court, and therefore not assignable for error. This was, however, said in cases where reviewed in the Appellate Court after verdict. The case at bar is now pending on indictment and if it goes back for re-trial, the defendants are entitled to have these objections to the sufficiency of the indictment determined before they are called upon to answer. 170 U.S. 613,

We do not deem it necessary to discuss at length the objections to the sufficiency of the indictment as to duplicity and want of certainty; nor do we deem it necessary to quote at length the language of the Courts in such cases. Judge Dillon in quashing an indictment for want of certainty in U. S. v. Walsh, 5 Dill. 58, said that the Statute 5440 had materially changed the offense of conspiracy as it existed at common law, and every ingredient of the offense must be clearly alleged in an indictment, adding:

> .'It is a settled doctrine that there are no common law offenses against the United States. The act or omission to be criminal and punishable in the Federal Courts must be declared to be an offense by Act of Congress. It follows that the Act of Congress must be the sole basis of the offense of conspiracy and this Sec. 5440 on which this indictment is founded changes in material respects the offense of conspiracy as it existed at common law."

He said that the English courts had sustained indictments in conspiracy framed in the most general manner and without alleging any overt acts, and hence arose the right of defendant to call for a bill of particulars, and he concluded:

> "This is an indictment for conspiracy to defraud the United States and the American decisions are uniform to the point that the means with which the fraud is to be effected must be described with certainty."

In U. S. v. Cruickshank, 92 U. S. 542, the Court said that the accused must be advised of the essential particulars of the charge against him.

> "So too it is in some States a crime for two or more persons to conspire to cheat another out of his property, but it has been held that an indictment for such offense must contain allegations setting forth the means and purposes to be used to accomplish the purposes. This, because to make such a purpose criminal, the conspiracy must be to cheat and defraud in the mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means and purposes in order that the Court may see that they are in fact criminal."

The indictment in this case was for conspiracy under Sec. 6 of the enforcement Act of May 31, 1871.

Rules and Regulations—

Reference has already been made to the failure of the indictment to set out the rules and regulations of the department which are referred to in both counts as violated by the acts of the conspirators and as constituting the basis of the crimes charged in the indictment. This objection is, of course, subordinate to the graver objection that the rules and regulations cannot have the force of statutes in constituting a crime.

The Venue. Three Conspiracies in Each Count.

Both counts of the indictment are clearly bad in the statement in the venue of the alleged crime, as shown by the au-

thorities cited in our brief, *supra,* p. 39. These averments are as follows:

> "On the 11th day of June, in the year of Our Lord, One Thousand Nine Hundred and Four, in the County of Garfield, in the County of Routt, in the County of Denver, in the District of Colorado."

This averment of three different venues, (first count, Rec. p. 2, second count, Rec. p. 17,) within the jurisdiction at the same time clearly makes the indictment bad for uncertainty, as it cannot be told at what place the conspiracy is to be proved, and what charges the defendants are to meet. The requirement of the statement of the venue of the crime is not only to show that the crime was committed within the jurisdiction of the court, as that requirement would be satisfied by the statement of any one place within the jurisdiction, but some venue is required in order to make the indictment definite in time and place. A conspiracy is a "breathing together," it is the *aggregatio mentium* which constituted the crime. The existence of the conspiracy may be discovered on the trial of the facts, but the essential elements of the alleged crime must be alleged with precision, and definiteness in the indictment. Here we have in each count three distinct conspiracies alleged, one made in Garfield County, one made in Routt and one in Denver. How can the defense of one of these protect us against prosecution from another? and how are we to know which one of the conspiracies the prosecution is to attempt to prove.

Uncertainty and Indefiniteness.

The indictment is also bad under these settled principles of law as to the required certainty and definiteness, on the following distinct grounds:

1st. Both counts are bad in definiteness in stating the scope of the alleged conspiracy. It does not clearly appear

in either without reference to the overt acts, whether the gravamen of the charge is the attempt to defraud or the means by which the attempt was made.

2d. The first count fails to set out the affidavits and power of attorney, alleged to be overt acts, in any form. No issue can be made thereon.

3d. The second count sets out certain powers of attorney, but states the same in ambiguous, contradictory and confusing language, so that it is impossible to determine what is charged with reference to the same.

4th. Thus it is said that papers are signed and in the same connection and in the same breath that the same papers were forged! (See overt acts in first and second counts.)

5th. The indictment is also defective in declaring that certain papers and filings were false, fictitious and forged, with no statement as to what papers said charge is made, and as to what papers are false, and what are forged, or what are fictitious, and defendants have no means of defending against such vague and indefinite charges.

5th. The indictment is also bad in both counts, in that it is alleged in the charging part of the indictment, which must be considered irrespective of the overt acts, that the entries were to be made by entrymen and not by any of the alleged conspirators. While it is inconsistent with and contraditory to the recital of the overt acts, the charging part of the indictment does not show that any act was done by any one of the conspirators in furtherance of the conspiracy, in the charging part of the indictment in each count.

6th. Both counts refer to the corporation The Yampa Anthracite Coal Company as one of the parties to whom conveyances by entrymen were made; but neither shows what, if any, was the relation between the corporation and

the defendants; whether the latter were members, officers, stockholders, employes or strangers.

7th. Both counts are bad in failing to set out the facts showing the excess of holdings of the grantees of the lands, instead of mere conclusions concerning the same.

It is obvious, from an examination of the indictment, that the alliterative vituperative epithets, "feigned," "fraudulent," "false," and "forged," were used recklessly as applicable to the same papers and to practically all of the papers mentioned in either count. Those papers are alleged to have been subscribed by the parties by whom they purport to have been signed, and in the same breath they are said to be forged. This is true in the case of many of the overt acts. Thus, in the first overt act of the count, it is said that Fred William Margenau was "hired," "induced," and "persuaded" to subscribe his name to the said "false," "fictitious," "forged," and "fraudulent" papers, to-wit, the declaratory statement, power of attorney, non-mineral affidavits and application of purchase. While the other alliterative epithets may have been used in a "Pickwickian" sense, the papers could not have been forged if they were signed, as is alleged by Mr. Margenau, the entryman. Such anomalies appear again and again in the forty alleged overt acts, *ex uno disce omnes.*

We submit that if it is a crime under the law for a citizen to arrange for the purchase of individual rights of entry from parties competent to make such entries of coal lands, that such charge ought to be clearly and definitely made so that the exact nature of the alleged crime can be determined, and defendants should not be put upon their trial under such vague, duplicitous and uncertain allegations, though embellished and clouded by alliterative and vituperative epithets. Certainly is this the case when a citizen is summoned, as our client, from his home a thousand miles away, to answer the charge of such an indictment.

As both counts of the indictment are therefore bad, both in substance and in form, the judgment of the District Court quashing the same should be affirmed.

Respectfully submitted,

FREDERICK N. JUDSON,
With Whom Are
TYSON S. DINES and
JOHN F. GREEN,
For Lewis M. Rumsey,
Defendant in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 286.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

F. W. KEITEL, ARIE KEITEL, FRANK P. FAY, LEWIS M. RUMSEY, WILLIAM BAER, WALTER S. PRICE, CHARLES F. W. HABERBECK, GUS HABERBECK, MAGDALENA HABERBECK, CHARLES H. DODGE, AND ANNA DODGE, DEFENDANTS IN ERROR.

REPLY BRIEF FOR DEFENDANTS IN ERROR.

FREDERICK N. JUDSON,
For Lewis M. Rumsey, Defendant in Error.
EDWIN H. PARK,
For F. W. Keitel et al., Defendants in Error.

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REPLY BRIEF FOR DEFENDANTS IN ERROR.

Since filing our briefs for the defendants in error in this cause, we have received a copy of the brief for the United States, which is entitled in this cause and in causes No. 287, No. 291, and No. 292. As orally suggested to the court, the defendants in error whom we represent object to the joinder of these causes for argument—that is, to be heard as one cause—for the reason that this cause, No. 286, involves not only different parties and different counsel from the others, but also different sections of the coal-land statute, and one of the cases, No. 292, is not a conspiracy case at all. In fact, it may be said that the cases are alike only in that they all relate to coal lands, and are all writs of error sued out by the Government from the sustaining of motions to quash, under the act of 1907.

We file this reply brief, therefore, on behalf of the defendants in No. 286.

I.

"Dummy" Entrymen.

On page four of the brief for plaintiff in error it is stated that the indictment in No. 286 charged in its first count that "*dummy*" entrymen were to be hired, who would be furnished by defendants with the money necessary to make payments to the Government, and, after obtaining titles in their own names, the "dummies" would convey to defendants or said corporation. As the word "dummy" is used with quotation marks as indicated, this reference clearly implies that such an allegation *in verbis* was made in the first count of the indictment.

An inspection of the two counts (Record, pp. 3-16) shows that the word is not used either in the first or the second counts.

The phrase is again used in the brief on page 13, in the sub-head III. of the argument, where it is said: "For in-" dividuals or associations to acquire from the United States " coal lands in excess of the specified quantity through '*dum-*" *my*' entrymen is a violation of the coal-land laws, and an " actual fraud."

The term thus used in the brief, not found in the indictment, is clearly misleading. The word "dummy" in its primary sense as given in the Century Dictionary is, "one who is dumb or silent;" while it has a secondary meaning of "sham, fictitious and feigned." The word is clearly used in its latter sense, and thus gives the impression that the indictment charges that persons made entries who were *disqualified* from entering, or the names of *fictitious* persons were used, so that in point of fact no lawful entry was made. An effort is thus made to bring the case within the charges of the indictment made in the case of Hyde *vs.* Shine, 199 U. S., 62, which is relied upon by the plaintiff in error.

On the contrary, the fact is that the indictment in neither

count makes any charge that any of the parties who made entries were in any wise *disqualified* under the law, from so doing. That is to say, it does not deny that the entrymen were citizens of the United States, of full age, and had never theretofore exercised the right of entry of coal lands, and therefore possessed all the qualifications prescribed for entrymen under the statute. They were, therefore, not "dummy" entrymen in any sense; and the term used is essentially misleading and unwarranted. It is true that both counts of the indictment make repeated use of the alliterative and vituperative epithets of "false, fictitious, feigned, " forged, and fraudulent;" but it is obvious that these words are used in a "Pickwickian" sense, as this is frankly admitted on page 52; that is to say, they are used in the sense that the papers which did "not recite the fact that the entry-" man had agreed to convey his right" were, because of the non-statement of that fact, false, fictitious, feigned, forged, and fraudulent.

This is frankly admitted on page 52 of the brief of the plaintiff in error, where it is said that "all allegations in " the indictments that the affidavits were forged, fictitious, " and feigned by reason of not being made under oath, etc., " as well as reference to the fact that some of the statements " were made under oath, may be treated as surplusage, and " the remaining allegations of the indictment would still be " sufficient."

The real charge in the indictment, therefore, is that the making of an entry of coal-lands under a pre-contract to convey the same, whereby the entryman extinguishes his right of any subsequent exercise, constitutes, in the absence of any statute penalizing or prohibiting such action, a fraud upon and a crime under the laws of the United States.

The use of the word "dummy," therefore, is misleading and improper, in that it implies an actual fraud in the use of fictitious entries, when no such charge is made in either count of the indictment.

II.

Cash and Preferential Entries.

The brief of plaintiff in error is misleading and inaccurate in another matter (and this is probably owing to the attempted briefing of four cases in one), in that it fails to distinguish this case, No. 286, from the others in the matter of *cash entries* authorized under Section R. S. 2347, and the *preferential* entries authorized under Sections 2348 to 2351.

The distinction between these two classes of entries has been referred to in the briefs heretofore filed, and need therefore only be briefly mentioned. Section 2347 provides for cash sales, upon application, to citizens at a fixed price; while the preferential entries provided in the succeeding sections provide for the securing of preferential rights of purchase conditioned upon opening and improving the mines, and completing the purchase within the specified time, one to three years after the entry.

Both counts in the indictment in No. 286 refer to *cash entries only*. This is clearly shown from the recitals of the counts, and in the forty overt acts in the two counts, all of which relate to cash entries only. It is true that the charges of the indictment are so cloudy, with their repeated alliterative and vituperative epithets, that it is not easy to determine what is covered thereby; but both counts were treated in the court below as relating to cash entries, both by counsel and by the court in its opinion. Thus, Judge Lewis says, in his opinion (Record, p. 93): "The indictment shows that the "entries were what are commonly called cash entries, made "under the first section of the act, and not what are known "as preferential entries, provided for under sections 2 and 3 "of the act. The only filing with the register by the entry-"man under the first section of that act, if any, is his appli-"cation."

No exception was made, in the fifteen assignments of error

filed by counsel with their application for the writ of error, to this finding of the court.

The statement on page six of the brief of plaintiff in error that the indictments in Nos. 287 and 291 are substantially the same as the first count of the indictment in the Keitel case (No. 286), but involving different parties, is, therefore, erroneous. Nos. 287 and 291 admittedly relate exclusively to preferential entries, while, as we have shown, No. 286 relates solely to cash entries.

In this connection we should also call attention to the statement on page 41, where it is said that the indictments in Nos. 286 and 291 "allege that the defendants contemplated "making representations that the entrymen were in actual "possession of the lands, etc., which representations would "be false and fraudulent. From this it appears that the "conspiracies included the claim of preferential rights, ac- "tual possession being expressly made by law a requisite of "such right."

It is true that, possibly through an oversight of the draughtsman, both counts of the indictment in No. 286 state that the application stated that the applicant was then and there in possession of the land. This was only one of the statements required in the case of preferential entrymen, and had no application, of course, to the case of cash entrymen.

The form of cash application then in use (that is, at the time of the transactions complained of) was as follows:

"*Cash Application.*

Land Office at —— ——.

No. —.

I, —— ——, of —— county, do hereby apply to purchase the — of section —, in township —, of range —, containing — acres, according to the returns of the Surveyor-General, for which I have agreed with the register to give at the rate of — per acre.

—— ——.

My post-office address is —— ——.

I, —— ——, register of the land office at —— ——, do hereby certify that the lot above described contains — acres, as mentioned above, and that the price agreed upon is — per acre."

It is contended by the plaintiff in error in its brief, on the authority of the Caha case (152 U. S., 211), that the court would take judicial notice of the regulations made by the Land Office under the authorization of section 2351. While we do not concede that this warrants the omission of such rules from the indictment when their existence is the "occasion" for the commission of a fraud upon the United States which will constitute a conspiracy under section 5440, we concede that the court may make reference to them for the purpose of illustrating the distinction between the two classes of entries.

III.

The Duplicity and Uncertainty of the Indictment Illustrated by Contentions of Plaintiff in Error.

In this connection it is proper to call the attention of the court to the fact, already adverted to in our brief, that the indictment is bad, not only in substance but in form, in that it fails in the requirements of certainty exacted in all indictments. This is illustrated by the confusion of this distinction between cash and preferential entries. While in the court below it was conceded that the two counts of this indictment referred to cash entries only, and the court so found we find counsel in this court claiming that the use of one word in the two counts enables them to include preferential entries also, where entirely different requirements are made of the entryman.

We have not deemed it necessary to dwell at length upon these objections to the form of the indictment because the indictment is clearly faulty in substance. We should, however, call the attention of the court to the fact that these

objections to form do not come before the court in this case under Act of 1907, as they do in writs of error from convictions in criminal cases. The defendants in error now in this court have their day in court on this question of the *certainty* as well as of the sufficiency of the indictment in charging a crime. This distinction was clearly illustrated in the case of Ledbetter *vs.* United States (170 U. S., 606), where the court, on a writ of error from a judgment of conviction, held that an indictment was good notwithstanding its allegation of time and place, was as follows: "On the — day of April, A. D. 1896, in the county of Appanoose, in the southern district of Iowa." But the court said, l. c., 613: "We do not wish to be understood as approving the "practice which was pursued in this case, or even as holding "that *the indictment might not have been open to special "demurrer for insufficiency as to the allegations of time and "place.* But upon motion in arrest of judgment we think "it is sufficient."

This case is, therefore, in effect, before this court now on special demurrer as to the certainty and as to the sufficiency of the indictment in all respects; and we submit that it is bad in form as well as in substance, as is shown in our original briefs.

On the question of *venue,* where the indictment in both counts charges that it was made in *three* different counties at the same time, it is said in the brief of the plaintiff in error "Manifestly it was intended to allege a *single* con- "spiracy formed and existing in all three counties, all of "which were within the jurisdiction of the court, and not a "separate conspiracy in each county." Perhaps that was what the framer of the indictment intended to say; but he did not say it. A conspiracy is a "breathing together," an *agreement;* it must be made somewhere and at some time, although its existence may be inferred by the jury from the circumstances of the case. We submit that this allegation is

clearly bad when tested by special demurrer under the ruling in the Ledbetter case.

Under the new doctrine in criminal law announced in the brief of plaintiff in error, that statutes and department regulations are the "occasion" of frauds, it is certainly requisite that these "occasions" which constitute the crime should be set out so that the defendant may be advised of the "nature and cause of the accusation against him" within the meaning of the Constitution.

We agree with the counsel for plaintiff in error in their brief filed in opposition to the motion to dismiss that if the Court takes jurisdiction of the case, it has jurisdiction of the whole case. Having jurisdiction of the case, there exists the power to consider every question arising on the record. (See Penn Mutual Life Insurance Co. *vs.* Austin, 168 U. S., 685, 695.)

IV.

Constructive Fraud under Section 5440.

The brief of the plaintiff in error substantially concedes, in not contesting our position, that the two counts of the indictment in this case would be bad at common law, as the acts charged do not involve moral turpitude, nor are they *mala in se* in any sense. Thus it is claimed (see p. 19) that section 5440 is to be applied in a broad and comprehensive way, so as to include "frauds upon the United States of every kind and character;" that it is to enforce upright and honest dealings with the Government in all departments of its administration, and that "every conspiracy to deceive the Government is forbidden by it."

In other words, a demand is made for a construction of this statute which would make criminal *whatever a court of equity might hold to be implied or constructive fraud*, such as this court has held is not included in the term as used in the Bankrupt act. As courts of equity have always declined

to define fraud, we would therefore have a state where, in the words of Blackstone, "no man would know how to behave "himself, or what to do, speak, or say," for doubt of the judicial construction which would hold him guilty of a conspiracy against the Government. And this, too, in face of the law, as declared by this court in U. S. *vs.* Brewer, 139 U. S., 278:

"Laws which create a crime ought to be so explicit, that *all men subject to their penalties may know what acts it is their duty to avoid.* Before any man can be punished, his case must be plainly and unmistakably within the statute."

No better illustration can be found of the warning words of Wharton, Wright, Stephens, and the other jurists who have discussed the "dangers to liberty" in the extension of the doctrine of criminal conspiracy, than the position taken by plaintiffs in error in their brief.

Mr. Wharton says on this subject, in his "Criminal Law," Section 2288:

"One of two alternatives we must here accept. We must, with the old English judges, look upon all voluntary combinations as suspicious, and an object of judicial suppression; or we must declare that only such combinations are penally cognizable as are here declared beforehand to be unlawful."

The anomaly of this doctrine claimed by plaintiffs in error is that it claims this extension of the law of criminal conspiracy in a government of *limited* powers, where there are admittedly no common-law crimes, and where it has been repeatedly declared that there can be no crime except where so declared by statute of the United States. We need not further dwell upon this subject, as it has been fully discussed in the briefs heretofore filed for the defendants in error.

V.

Public Policy of the United States in the Acquisition and Alienation of Coal Fields.

It is claimed by plaintiffs in error in their brief that there is a distinction between the right of *acquisition* and the one of *alienation*. It is admitted that there is no prohibition in the statute of the exercise of the right of alienation; but it is claimed that the conspiracy in this case antedated the acquisition of the right in the lands, and therefore it was against public policy. It is not claimed that a contract by a qualified entryman to convey his land when he acquires it is forbidden, much less penalized, by any law or statute of the United States; but it is argued that such a pre-contract is violative of the policy of the Government, and therefore is a fraud upon the Government.

We submit that this attempted distinction has no support either in principle or in authority. Coal lands are not sold for the purpose of being settled with the homes of people, as in the case of the pre-emption and successive homestead laws; but, as in the case of mineral lands, with which they are properly classed, they are opened for sale for the purpose of developing the resources of the country. As fully shown in our briefs, the right to enter coal lands is valueless to the poor man, unless he can obtain the assistance of capital in the development of those lands. The Government does not give the lands away, but offers them for sale at a price varying from ten to twenty dollars an acre, according to their distance from railroad transportation facilities. The courts have uniformly declared that the right of alienation is incident to *every property right* which is capable of possession in any sense. Whatever a man owns he can transfer, unless there is some statute prohibiting the exercise of that right.

In St. Louis Mining Co. *vs.* Montana Mining Co., 171 U. S., 650, this court, in holding that an adverse claim to

land included in a mining location made by another was capable of assignment which was legally enforcible, in answer to the objection that the assignment of such a claim was against public policy, said that "the public policy of the "Government is to be found in the Constitution and the laws "and the course of administration and decision." * * * "There is no inhibition in the mineral lands act against "alienation; and he may sell it, mortgage it, or part with the "whole or any portion of it, as he may see fit."

Such a case was distinguished from that of a homestead entry, because, as said in Anderson *vs.* Carkins, 135 U. S., 483: "The theory of the homestead law is that the homestead shall be for the exclusive benefit of the homesteader." And there is in effect in the homestead statute a prohibition of alienation, as the homestead right cannot be perfected in case of alienation or contract for alienation without perjury by the homesteader, as the statute requires an affidavit of non-alienation.

This fundamental principle of the assignability of everything of value has been repeatedly declared by the Federal courts in cases involving the additional homestead rights and the rights of soldiers and sailors to make entries. Thus, in Mullen *vs.* Wine, 26 Fed., 206, it was held by Mr. Justice Brewer, on the circuit, that the *right to enter* and locate eighty acres of land was a "thing of value," was property, and personal property; and the court added:

"It was a mere right of selection and taking. Like all "property, it was the subject of sale. The right to sell prop-"erty need not in terms be granted. It exists if it is not in "terms withheld. * * * When this right has been exer-"cised, the location and entry made, who would doubt the "right to sell the land; and why should the right to sell "exist after entry *and not before?* Congress has placed no "restriction,—who may?"

The same view was taken by Judge Nelson in 57 Fed., 956; and this opinion was confirmed by the Circuit Court of

Appeals for the Eighth Circuit in Barnes *vs.* Poirier, 27 U. S. App., 500.

In Webster *vs.* Luther, 163 U. S., p. 331, this court, in an opinion by Mr. Justice Harlan, construed the section (R. S., 2306) authorizing homesteaders who had made an entry of less than 160 acres to make an additional entry for the deficiency. The court said that this deficiency right was not subject to the restraints on alienation imposed upon homesteaders under the act of 1862 as amended; that the *reasons of public policy* which led Congress to impose that restraint upon alienation did not exist; the homesteader was not expected to settle or occupy this additional land; and that no residence on or cultivation of the land as a condition of securing the additional right was intended. It was given as a mere gratuity, and it was assignable. The court therefore said that the assignment before entry of this additional land contravened no public policy of the nation, and violated no statute.

In answer to the objection that the practice of the Land Office had been different, and had assumed that this additional right of entry given by the statute was entirely personal, and not assignable or transferable, the court said that "it would not permit the practice of an executive de-" partment to defeat the obvious purpose of a statute."

In the case at bar we are asked to infer a public policy, not from the practice of the Department, but from its rules adopted *after* the transactions for which the defendants in error are indicted!

The right to enter coal-lands is not limited to any class of citizens, as in the case of the soldiers and sailors under the homestead act above referred to, but is open to all citizens of lawful age, on payment of a stipulated price, for a prescribed quantity of the land. When the entry is once made, the right is extinguished. The *right to make the entry*, or "acquisition" as stated by counsel, therefore, if the lands are worth for development more than the Government charges,

is a *thing of value*, precisely as the right of the representatives of soldiers and sailors to make entry was to them a thing of value before location. It is an intangible right; but whether its value be more or less, it is, in the absence of prohibitory or restrictive legislation, alienable and assignable. The attempted distinction between the right of acquisition and the right of alienation is, therefore, wholly unmeaning. When the right of acquisition exists, that right is itself alienable, whether its value be more or less. The limitation of the citizen to a single entry of 160 acres, while it may facilitate the acquisition of large tracts of coal-land by capitalists who have the means to develop them, of necessity requires that the individual entrymen who make entries upon desirable land must be paid for their rights, what they deem them worth. The statute, thus construed, at once facilitates the development of the country, while protecting the individuals in their rights of individual entry by permitting them to contract for what they deem their value, either before or after they perfect their entry. (See Pereless *vs.* Weil, 157 Fed., 414, *infra.*) The alienation, therefore, in case at bar did not antedate the right, but it did antedate, as it rightfully could, the exercise of the right by the entry thereunder.

Under the mining law, assignments of placer claims have been sustained. This principle of the assignability of property rights is illustrated in the rulings of the courts upon the assignability of claims under the mining laws of the United States, as in the case of "grub-stake" contracts, which have been held assignable, though oral, and wherever capable of proof.

The subject of the assignability of mining claims is fully discussed in Smelting Co. *vs.* Kemp, 104 U. S., p. 636. The Court said in this case (p. 654):

"The law limiting the extent of mining lands which an "individual may locate has provided so far as it was deemed "wise against an accumulation of them in one person's

"hands. It could not have prohibited the sale of the loca-
"tion of an individual without imposing a restriction in-
"jurious to its interests, and, in many instances, destructive
"of the whole value of the claim. Everyone at all familiar
"with our mineral regions knows that the great majority of
"claims, whether on lodes or on placers, can be worked ad-
"vantageously only by a combination among the miners, or
"by a consolidation of their claims through incorporated
"companies. * * * Indeed, successful mining, whether
"on lode claims or placer claims, can seldom be prosecuted
"without an amount of capital beyond the means of the in-
"dividual miner."

This language applies even more forcibly to the case of coal mining. Coal is not as valuable as the precious metals. It must be handled in greater quantities, with greater expenditure of capital, and with little or no opportunity for "making a strike," which is the feature of mining for the precious metals. In this case, therefore, the Government, in the language of the court in the case quoted, has provided as far as it has deemed wise against an accumulation of them in one person's hands by limiting the individual entryman to one entry of 160 acres. If his right to avail himself of the value of this right of entry cannot be exercised without subjecting himself and the purchaser to an indictment for criminal conspiracy to defraud the Government, the value of such rights of entry will be practically destroyed, and the purpose of the statute effectually defeated.

VI.

No Support in Precedent for the Position of Plaintiff in Error.

It is intimated in the brief of the plaintiff in error that the claimed comprehensive scope of section 5440 has been sustained by the courts; and it is said that the decision of the District Court quashing this indictment is without prece-

dent, and contrary to the numerous decisions of district and circuit courts, circuit courts of appeals, and this court. We are compelled to challenge this statement; and we say, on the contrary, that the position of the court below is in harmony with the authorities.

Thus, the case cited from this court, Hyde *vs.* Shine, 199 U. S., 62, is clearly not in point, as there the alleged fraud consisted in using the names of *fictitious or disqualified persons*, by the use of forged affidavits and the like, so that disqualified persons became entitled to purchase. In other words, there was a fraud in fact, and a direct violation of the statutes. It will be observed, too, that this was a *habeas corpus* case, in which nothing was before the court but the sufficiency of the charging papers to warrant removal of a party from his State to the District of Columbia for trial.

The case of United States *vs.* Lonabaugh, 158 Fed., 314, cited in the brief of the plaintiff in error, was the ruling of the district judge; and the case is now pending under submission in the Circuit Court of Appeals of the Eighth Circuit waiting final disposition.

The case of United States *vs.* Robbins, 157 Fed., 999, is the opinion of the district judge on demurrer to an indictment, and that case is still pending in that court.

Neither of the above district court cases, therefore, are the final judgments of the court.

In connection with these opinions of the district judges, we call the court's attention to the opinion of Judge Sanborn in the Eastern District of Wisconsin, in case of Peckess *vs.* Weil, 157 Fed., 419. He discharged, on *habeas corpus*, certain defendants, citizens of Wisconsin, whose removal to Colorado for trial under indictment for coal-land conspiracy had been ordered by the commissioners. The indictment, in that case found insufficient, was returned by the same jury as the case at bar.

The court held that in the coal-land statute of 1873 "the "policy of fair play, equal opportunity to acquire the land

"most clearly appears, but without anything to discourage "speculation *or prior contract*." He called attention to the absence of the restrictions found in the preemption and homestead laws, and held that in the absence of "actual "fraud, perjury, and dummy entrymen" there was no criminal conspiracy in the corporations securing coal lands through pre-contract with the entrymen.

We are advised that this case has been appealed to the U. S. Circuit Court of Appeals for the Seventh Circuit, where it is now pending, as the Lonbaugh case is pending in the Court of Appeals for the Eighth Circuit.

The cases cited from the Circuit Court of Appeals in the Second Circuit, Gantt *vs.* U. S., 108 Fed., 61; in the Fifth Circuit, Bradford *vs.* U. S., 152 Fed., 617, and in the Eighth Circuit, Stearns *vs.* U. S., 152 Fed., 900, are none of them in the point, for the reason that in each case the conspiracy was based on fraudulent entries under the homestead act, involving, necessarily, perjury and subornation of perjury.

The case of United States *vs.* Gordon, 22 Fed., 250 (Minn.), in the district court, involved false affidavits under the pre-emption law, which contained a statutory requirement of affidavit of non-alienation. The court in its opinion used language unnecessary for the decision of the case, which is quoted by counsel on page 27 of their brief. *This is the very language* which is quoted by Mr. Wharton and criticised by him as in effect giving the Federal courts jurisdiction even beyond the limits of the common law in a matter of conspiracy, and as violative of principle and precedent. (See Wharton's "Criminal Law," vol. II, p. 208, and quoted in brief for defendant Rumsey on pp. 52-53.)

In United States *vs.* Owen, 32 Fed., 534 (district of Oregon), there was actual fraud in the corrupt combination between the land inspector of the Government and another party for the fraudulent inspection of swamp lands.

The case of United States *vs.* Mitchell (district of Oregon), 141 Fed., 666, involved illegal homestead entries in forest

reserves. This case also involved perjury and subornation of perjury.

We confess we do not understand the practice adopted in the brief of plaintiff in error of treating the denial of petitions for certiorari as a "holding" by this court of any kind in the cause, other than that it declines to take it up for consideration. Thus, on page 28, the case of Curley *vs.* The United States, 130 Fed., 1, is also cited as 195 U. S., 628, because on that page is noted the denial of the petition for the writ of certiorari.

On page 34 is quoted the language of the court in U. S. *vs.* Morse, 161 Fed., 429, which is not a coal-land case at all, but says of the Curley case that the refusal of the writ of certiorari is an "authority demonstrating the willingness of the highest tribunal to let the law alone." With due deference to the court, we think it would be more accurate to say that the court concluded to let the *case* alone.

The Curley case, 130 Fed., 1, has been fully discussed in our respective briefs. This case, involving a false personation for a civil-service examination for a Government office, and that of United States *vs.* Stone, 135 Fed., 392, involving the weighting of life-preservers required by Federal statute, were both cases of acts of moral turpitude, and were clearly frauds against the United States—not in the sense that the statutes of the United States simply made occasion for the frauds, but that they were directly aimed (certainly in the Curley case) at the performance of the functions of the Government, through its officials; while the Stone case involved the defeat of the provisions made by Congress for the safety of travelers on steamboats. Neither of these cases affords any support to the doctrine of "constructive conspiracy" asserted in the case at bar.

The same may be said of the Morse case (161 Fed., 429), and the Haas case, unreported. One involved defeating the laws regulating the banking system of the country, and the other corrupting public officials.

We submit that none of the cases cited afford any support for the position of plaintiff in error.

Reliance is placed upon the case of United States *vs.* The Trinidad Coal Co., 137 U. S., p. 161, and this shows the essential weakness of the position of plaintiff in error. That was a civil suit; this is a criminal case; and we submit that the Trinidad case cannot be carried into the domain of criminal jurisprudence for the purpose of defining the meaning of the word "defraud" as the basis of the indictment.

The case of Caha *vs.* The United States, 152 U. S., 211, is cited and quoted from on pages 53 *et seq.* in support of the position that the regulations of a department may furnish an opportunity for the commission of a crime. The Caha case was not a conspiracy case at all, but involved a perjury committed in a contest in the Land Office under the homestead laws. As the law provided for such contests in the Land Department, it was held that the administration of oaths was a necessary incident of such contests; and that is all there was in the case. The court reaffirmed its ruling in the Eaton case, 144 U. S., that the regulations of a department could not declare an act or omission a criminal offense; and this ruling has been reaffirmed in the recent Williamson case, decided at the last term of the court, which has been referred to in our briefs.

There is nothing in the case of *In re* Kollock, 165 U. S., 526, cited by counsel, which is in conflict with the Eaton or Williamson cases cited above.

Counsel cite the opinions of the district courts in the Dobson and Fout cases as to the meaning of section 4746. We do not deem it necessary to discuss this matter, not only because we have sufficiently referred to it in our briefs, but also because Judge Lewis did not base his judgment quashing the indictment upon a different construction of this section, but upon his finding that the papers alleged to be fraudulent were *not required by the statute*, but, if at all, by the rules and regulations of the Department. As we

have shown in our briefs, and also *supra*, p. 6, it will appear, by reference to the rules and regulations of the Land Department, that affidavits of non-alienation were not required in the case of cash entries; so that there was no authority, either in the statute or in the *rules*, for making the papers alleged to have been fraudulent, and which are the basis of the second count of the indictment.

We submit, therefore, that the judgment should be affirmed.

FREDERICK N. JUDSON,
For Lewis M. Rumsey, One of Defendants in Error.
EDWIN H. PARK,
For F. W. Keitel and Others, Defendants in Error.

15

Office Supreme Court, U. S.
FILED.
MAR 6 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. ~~626~~. 287

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ROBERT FORRESTER ET AL.

Appellees' Memorandum of Reasons for Not Consolidating This Case for Argument with Nos. 625 and 631, and for Allowing Full Time for the Argument in This Case.

The questions presented in this case are essentially different from those presented in the Keitel case (No. 625) and the Herr case (No. 631).

The single count in this, the Forrester case, as counsel for the appellees understand it, attempts to charge, under the "defraud" clause of the Revised Statutes, section 5440, a *conspiracy to defraud* the United States by procuring the making of *preferential* coal entries under section 2 and 3 (R. S., secs. 2348 and 2349) of the coal-land law, by individuals for the benefit of a corporation, whereby the corporation would acquire a quantity of coal land exceeding the quantity which it could directly enter and purchase under the coal-land law, and the controlling question presented is whether such an alleged scheme, although it might be

ground for relief in equity, would, if carried out, be a defrauding of the Government, in the criminal sense.

In the Keitel case (No. 625) the indictment contains two counts. The first count, as construed by the court below, attempts to charge, under the "offense" clause of the Revised Statutes, section 5440, a *conspiracy to commit offenses against the United States*, viz., the making and filing of false and fictitious affidavits for the purpose of securing the allowance of cash (non-preferential) entries under the first section (R. S., sec. 2347) of the coal-land law.

As we understand it, the controlling question presented is whether or not the making or filing of such a false or fictitious affidavit (required not by statute, but only by regulation of the Land Department) is a criminal offense under the laws of the United States; and the question presented in the Forrester case can arise in the Keitel case only in the event that this first count can be construed to charge a conspiracy under the "defraud" clause of the Revised Statutes, section 5440; and even then there would be the essential difference that the departmental regulations under the first section (non-preferential) of the coal-land law, involved in the Keitel case, do not require the statement under oath that the entry is made for the sole use and benefit of the entryman, while the regulations under the second and third sections (preferential), involved in the Forrester case, do require such sworn statement.

The second count in the Keitel case attempts to charge, also under the offense clause of the Revised Statutes, section 5440, a like conspiracy to do the things set forth in the first count, but alleging them to be violations of the Revised Statutes, section 4746, as amended by the act of July 7, 1898 (30 Stat., 718), thus raising questions as to the construction and scope of the Revised Statutes, section 4746, as amended, which are in no wise involved in the Forrester case.

It will thus be seen that the Forrester case and the Keitel case present radically different questions, and that the only

material question which can be common to both arises in the Keitel case only through an alternative and doubtful construction of the first count in that case.

Furthermore, counsel in the Keitel case have announced their intention to file a motion to dismiss, raising questions as to the construction and application of the recent statute under which the appeal is attempted to be taken. If this motion should be considered at the argument upon the merits, a considerable portion of the time allowed would be consumed in the discussion of those questions.

Counsel in the Forrester case purpose not to raise any question as to the right of appeal, but to argue the merits of the case, and feel that the questions involved could not be fully and properly presented in less than the full time allowed by the rules. They therefore ask that the Forrester case be not consolidated for argument with the Keitel case, but either precede or immediately follow that case.

No. 631, U. S. *vs.* Herr, does not involve conspiracy, but an alleged offense under the Revised Statutes, section 4746, and presents questions wholly different from those in the Forrester case.

The Herr and Franklin case (No. 630), however, presents substantially the same questions as the Forrester case, and the setting of that case case for argument with the Forrester case is not objectionable; but in such event counsel still ask the indulgence of the court to the extent of allowing counsel in the Forrester case the full time allowed by the rules.

Respectfully submitted,

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JOHN M. WALDRON,
Attorneys for Robert Forrester et al.

In the Supreme Court of the United States.

October Term, 1908.
No. 287.

Office Supreme Court, U. S.
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Clerk.

THE UNITED STATES,
Plaintiff in Error,

vs.

ROBERT FORRESTER, BENJAMIN N. FREEMAN, OTIS S. SPENCER, FRANK ELDREDGE and GEORGE C. FRANKLIN,
Defendants in Error.

In Error to the District Court of the United States, for the District of Colorado.

(21029)

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

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Attorney for Defendants in Error.

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Smith-Brooks [illegible] Press, Denver.

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NOTE.—Italics in brief those of counsel, except where otherwise indicated.

In the Supreme Court of the United States.

OCTOBER TERM, 1908. No. 287.

THE UNITED STATES,
PLAINTIFF IN ERROR,

vs.

ROBERT FORRESTER, BENJAMIN N. FREEMAN, OTIS B. SPENCER, FRANK ELDREDGE AND GEORGE C. FRANKLIN,
DEFENDANTS IN ERROR.

In Error to the District Court of the United States, for the District of Colorado.

(21029)

STATEMENT OF CASE.

This cause is here upon writ of error sued out by the United States, to obtain a review of the judgment of the District Court of the United States for the district of Colorado, sustaining a general demurrer to an indictment returned against the defendants in error, by which they are sought to be charged with entering into a criminal conspiracy to *defraud* the United States in violation of section 5440, United States Revised Statutes.

Ignoring the verbiage, epithets and legal conclusions contained in the indictment, the framework and essence of the charges set out therein can be briefly expressed.

The defendants are said to have agreed with each other to procure qualified entrymen to purchase from the United States certain of its coal lands, situate in Colorado, by making *final* entries thereof under "preferential" rights theretofore vested in each entryman, under the provisions of sections 2348 and 2349, U. S. R. S., such purchases to be made by the entrymen in their own names and individual right, and for the quantity of land, which the law permitted them, respectively, to acquire; each entryman, for a consideration satisfactory to

him, to be induced, prior to his final entry, to agree to convey his tract thereafter to some one of the defendants; the ultimate design of the defendants being to have the title to all of the lands so to be acquired, conveyed to and vested in a certain corporation known as the Calumet Fuel Company; the purchase moneys necessary to be paid to the United States, and the incidental expenses connected with the *final* entries, to be advanced by the defendants to the entrymen, respectively.

The statement then follows, that the aggregate quantity of coal lands so designed to be entered was in excess of the total amount the said corporation was permitted by law to purchase directly from the United States.

The indictment further charges that the alleged conspiracy contemplated that each entryman should make a certain affidavit at the time of final entry, to the effect that the entry was being made for the entryman's "own use and benefit," and not "directly or indirectly for the use and benefit of any other person."

The affidavit thus referred to is one *solely exacted* by a *departmental* regulation, in connection with the *final* entry by a coal land claimant, who had *theretofore* settled upon and *acquired a preferential right of purchase* under the provisions of sections 2348 and 2349, U. S. R. S.

We say, "*solely exacted*," because *no statute* of the United States either directed or required the making of such affidavit in connection with *a coal land entry of any character*.

The commission of certain alleged overt acts, designed to effectuate the objects of the asserted conspiracy, are also charged in the indictment.

The foregoing comprises, all and singular, the essential basic facts upon which the prosecution rests, and the question is squarely presented by the demurrer to the indictment, do the contracts entered into by the defendants with each other to secure entries of coal lands under the stated circumstances, constitute any crime known to or defined by any statute, or statutes, of the United States?

The problem thus presented is untrammeled in this tribunal by the doctrine of *stare decisis*, and it must be solved by the application of basal principles of criminal jurisprudence.

Our contention throughout, in the argument about to follow, will be, that the question above propounded should be answered in the negative, and the judgment of the District Court accordingly affirmed.

LAW OF THE CASE.

I.

As a preliminary proposition (wholly apart from our main contentions herein), the rationale of opinion in Williamson vs. United States, 207 U. S., 425, per se, warrants affirmance of judgment under review.

The controlling principle in the Williamson case, as decided by this court, is that although the *second* section of the timber and stone act of June 3, 1878, required from a person seeking to avail himself of the benefit of the act, an affidavit containing, *inter alia*, statements to the effect that the applicant was not seeking to purchase the desired tract on speculation, but in good faith, to appropriate it to his own exclusive use and benefit, and that he had not directly, or indirectly, made any agreement or contract, in any way or manner, whereby the title designed to be acquired should inure to the benefit of any one except himself, nevertheless, inasmuch as the *third* section of the act did not exact any affidavit or statement from the applicant to the like effect upon making his *final entry*, the entryman could lawfully contract, in the interim, between the original application and the final entry, to sell or transfer his title to the tract after purchase, notwithstanding the existence of a land office *regulation* which required the entryman, upon final entry, to make an *affidavit* or take an oath of like tenor with that so exacted by said second section.

A compendium of the timber and stone act will serve to bring out in relief the essence of our present contention.

Section 1 of that act provides that unreserved public lands in certain states and territories "valuable chiefly for timber * * * may be sold * * * in quantities not to exceed one hundred and sixty acres to any *one* person or *association of persons*, at the minimum price of two dollars and fifty cents per acre."

Section 2 requires an applicant desiring (and so authorized) to purchase, to file a written, verified statement in duplicate, in that behalf, with the register of the proper land office, in which statement the applicant must assert, *inter alia*, that "he does not apply to purchase" the land "on speculation," etc., and "that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title which he might acquire from the United States, should inure, in whole or part, to the benefit of any person except himself."

False swearing in the premises is denounced as perjury, and the additional penalty of forfeiture of purchase money is imposed, and the title which may be acquired from the government is declared void "except in the hands of bona fide purchasers."

Section 3 requires publication for sixty days of the pendency of the application, and on the date set for hearing the applicant is required to "furnish to the register of the land office satisfactory evidence."

1st. That the publication, as aforesaid, has been made.

2d. That the land sought to be purchased "is of the character contemplated in this act," and that it does not apparently contain valuable deposits of certain enumerated minerals.

Thereupon, after payment of purchase price and fees, a patent is authorized to issue, etc.

The foregoing embodies all of the provisions of the above act germane to the present discussion.

Notwithstanding the first section of the timber and stone statute expressly restricts sales thereunder to one hundred and sixty acres in amount to "any *one* person or association of persons," and regardless of the minute, stringent prohibitions against alienation contracts contained in the second section thereof, this court held, in the Williamson case, that because the *third* section of the act was *silent* on the subject of alienation contracts which might be entered into by the applicant *after* filing the preliminary written statement, pursuant to the second section, but *before* final entry and purchase, such contracts made by the applicant, between those periods of time would be valid.

This means that though the applicant had never taken possession of the land he was seeking to purchase, nor improved it in any manner (the statute not exacting either act), nor, as yet, had paid one cent of purchase money to the government, nor was subject to any legal or equitable duty to ever purchase, he, nevertheless, could lawfully contract to complete his purchase thereof, and convey the same to another, *merely because he had filed a written notice of his desire to purchase.*

Now, if an alienation contract by a *timber* applicant is lawful, under the stated circumstances, how can it be logically contended that a like contract by a preferential *coal* entryman, *after* he has taken possession of a tract of coal land and commenced the work of opening a coal mine thereon, and who has also filed his declaratory statement, under sections 2348 and 2349, U. S. R. S., is invalid?

The *entire* coal land act is as silent on the subject of alienation contracts as is the *third* section of the timber and stone act. If the absence of express statutory prohibition against such contracts in that section renders them lawful under the last act, upon what principle of statutory construction, or legitimate process of reasoning, or rule of logic, can they be held *criminally* illegal under the coal land law, especially when the *implication*, if any, is greater in favor of the lawfulness, of such agreements, when made by a coal land claimant, than is true of a claimant under the timber law?

The application of the doctrine announced in the Williamson case, to the one at bar, is this: The indictment herein, by the clearest intendment and necessary inference, admits that the alleged conspiracy contemplated the entering into of contracts for the acquisition of title to the coal lands mentioned in the indictment, with persons who were already clothed with the preferential right of entry and purchase under the provisions of sections 2348 and 2349, U. S. R. S. Those sections will hereafter be set out in full, but for the purposes of the present comments thereon, their substance and effect need only be noticed.

Section 2348 confers upon a person qualified to enter coal lands, under the provisions of section 2347, a *preferential* right of entry and purchase, to the extent of one hundred and sixty

acres, in the case of a natural person who shall take actual possession of the tract of coal land, and in addition open and improve a coal mine thereon. The like preferential right of entry is conferred upon an association of not less than four persons, to the extent of 640 acres, provided such association shall have expended not less than $5,000 in working and improving a coal mine or mines upon the land so possessed and improved.

Section 2349 requires the filing of a declaratory statement by the claimant, in the proper land office, within sixty days after the date of actual possession and commencement of improvements on the land occupied, and under the provisions of section 2350 one year is allowed after the filing of such declaratory statement within which to make final entry and payment for the land at the prescribed statutory price.

Under these provisions of the coal land act, a qualified person who settles upon a given tract of coal land, not exceeding the statutory limit as to amount, and begins the work of opening up and improving a coal mine thereon, and in addition duly files his declaratory statement in the premises, becomes possessed of an inchoate property right and interest in the land so settled, filed upon and improved, and in the absence of an express statutory prohibition, by virtue of the common law power of alienation, is clothed with the right to enter into valid contracts for the disposition of such land, in anticipation of his subsequent acquisition of the legal title thereto.

This contention finds express support in the remarks of this court in Clark vs. Herrington, 186 U. S., 206, where Mr. Justice Brewer, without dissent, said:

"Again, even before the acquiring of *even* an equitable title to the land as against the government, contracts made by actual settlers concerning their possessory rights and *the title hoped to be acquired* from the United States, may be valid between the parties thereto and enforced in the courts."

The coal land act does not, in terms, forbid a person who contemplates an entry thereunder (whether preferential or *otherwise*) to contract in advance of his purchase to convey to another the land he intends to enter. It therefore necessarily follows that a coal *preferential* entryman, after he has filed his declaratory statement, commits neither a crime, nor even a civil wrong, against the United States, by contracting to convey the title

he may thereafter acquire by final entry to the land he has settled upon and improved.

And the indictment herein charges, in effect, that the alleged conspiracy contemplated the securing of contracts from *preferential* entrymen under the circumstances thus outlined—only this and nothing more.

We therefore submit that the course of reasoning, and underlying principles announced, in the Williamson case, should suffice to relieve the defendants in error from all criminal accountability for the entering into of the agreements and combinations forming the sub-stratum of the pending prosecution.

II.

No character of coal land entry made or designed to be made, can be utilized in aid of a prosecution under section 5440, where the entryman was duly qualified to make the purchase, though he may have contracted, prior to entry, to convey the land to another.

Our main contention, however, throughout the entire argument that follows, will be that the coal land act is so framed that *no* character of entry thereunder, whether it be a "private cash" under section 2347, Rev. Stat., or a "preferential" one under section 2348, id., can ever be made the basis of a criminal prosecution for conspiracy, where the entrymen designed to be procured, were themselves duly qualified to enter, and the amounts to be entered by them, respectively, did not exceed the statutory limitation in that behalf, and where, in case of preferential entries under section 2348, the provisions of the statute, as to settlement, improvement, etc., were intended to be complied with.

The indictment herein is based upon the provisions of section 5440, United States Revised Statutes, as amended by the act of May 17, 1879, vol. 1, Supp. Rev. Stat., 264, the amended section reading as follows:

"If two or more persons conspire, either to commit any offense against the United States, or to *defraud* the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than $10,000.00, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

And the pivotal question is whether the alleged conspiracy contemplated the doing of acts which, when committed, would amount to a defrauding of the United States, within the true intent and meaning of the word "defraud" as thus employed, there being no claim or pretense, upon the part of the government, that the supposed conspiracy contemplated the commission of a substantative "offense," as defined by any federal statute.

We believe it to be axiomatic in the law of criminal conspiracy, that where the subject-matter of the supposed criminal combination relates to the doing of acts which, if carried out in accordance with its purpose, would not operate to "defraud" the United States within the purview of section 5440, then and in such case a criminal conspiracy thereunder does not exist.

Before discussing the significance or efficacy of the word "defraud," as employed in the section under consideration, we desire to remind the court of the elementary proposition that the federal courts possess no common law criminal jurisprudence, and that a citizen can not be subjected to penal liability involving deprivation of either life, property or liberty, save and except by virtue of congressional legislation, which, in and of itself, adequately *defines* as a crime, the particular acts with the commission of which he may stand charged.

After briefly presenting the authorities in support of the doctrine thus stated, we will then undertake to show, by copious citations from judicial decisions and text books, that the term "defraud," employed in section 5440, is so vague and uncertain that, standing unaided by some *other* federal statute defining what acts shall constitute a defrauding of the United States, it should, in principle and upon constitutional grounds, be held inoperative as the foundation of a criminal prosecution for conspiracy under that section.

III.

Congress has never, in terms, prohibited the making of contracts of the character set forth in the indictment, and crimes can not be created by judicial implication or construction.

The question of the power of the federal courts to take cognizance of any criminal offense, other than one *defined by*

congress, was first considered in U. S. vs. Worrall, 2 Dallas, 384, 394, where Chase, J., observed:

"It appears to my mind to be as essential that *congress should define* the *offenses* to be tried, and apportion the punishments to be inflicted, as that they should erect courts to try the criminal, or to pronounce a sentence on conviction."

Chief Justice Marshall, in U. S. vs. Wiltberger, 5 Wheaton, 76, 95, said:

"It is the *legislature*, not the court, which is to *define a crime* and ordain its punishment."

In U. S. vs. Hudson, 7 Cranch, 32, 34, this court said:

"The *legislative* authority of the Union *must first make an act a crime*, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

Adding:

"All exercise of criminal jurisdiction in common law cases, we are of the opinion, is not within their (federal courts) implied power."

In Manchester vs. U. S., 139 U. S., 240, 262, it was said:

"The courts of the United States * * * *in the absence of legislation by congress, have no criminal jurisdiction whatever.* The criminal jurisdiction of the courts of the United States is *wholly* derived from the statutes of the United States."

In Todd vs. U. S., 158 U. S., 278, 282, Mr. Justice Brewer, as the organ of the court, remarked:

"It is axiomatic that *statutes creating and defining crimes can not* be *extended by intendment*, and that no act, however wrongful, can be punished under such a statute, *unless clearly within its terms.* There can be *no constructive offense*, and before a man can be punished, his case must be plainly and *unmistakably* within the statute."

For other authorities, distinctly announcing the rule that the entire criminal jurisdiction of the federal courts rests upon congressional enactments, wherein the acts sought to be denounced as crimes, are those, and those only, which are so defined by such legislation, see:

Jones vs. U. S., 137 U. S., 202, 211.
U. S. vs. Dietrich, 126 Fed., 676, 678.
Peters vs. U. S., 94 Fed., 127, 131.

U. S. vs. Coppersmith, 4 Fed., 198, 204.
Smith vs. Alabama, 124 U. S., 465, 478.

We have thus shown, as we think, conclusively that it is the exclusive function of congress to define what acts shall constitute a criminal offense.

It is, of course, unnecessary to dwell upon the significance of the terms "define" and "definition." All standard lexicographers practically unite in ascribing to them "the process of stating the exact meaning of *a word* by means of *other* words."

If we are, therefore, able to demonstrate that the word "defraud," standing alone, is a term of such uncertain and indeterminate import, as not to amount to a statutory definition of the acts necessary to constitute a crime, then we are jusified in logically insisting that unless some federal statute other than section 5440 denounces the particular contracts under consideration as fraudulent, the pending prosecution should necessarily be held ineffective.

IV.

Term "defraud," employed in section 5440, defines nothing. Hence, unaided by other federal legislation, is ineffective as the basis of a criminal prosecution.

The subject of *statutory* conspiracy is discussed in section 2922, volume 4, Elliott on Evidence, as follows:

"The United States * * * have statutes prescribing penalties against conspiracy. But these statutes do not profess to *enumerate* the *acts* necessary to constitute the offense."

The section then specifically refers to section 5440, and concludes:

"The decided cases holding the proof sufficient to establish a conspiracy under the statutes are *better precedents than abstract rules.*"

Prof. Wharton, in his work on Criminal Law, volume 2, section 1356a (9th Ed.), in expounding the effect and meaning of section 5440, U. S. R. S., *inter alia*, says:

"In the second clause, the word 'defraud' should be construed in the sense of committing a fraud, which is *itself indictable by federal statutes.*"

We freely concede that the views thus expressed by the learned commentator have not been followed by the federal courts in the exposition of section 5440, in connection with criminal prosecutions thereunder.

We cite the author, however, for the purpose of showing that one of the most accomplished and profound writers upon criminal law has ascribed a special, limited meaning to the word "defraud" in section 5440, much narrower than we contend for in the present argument.

The extraordinary ambiguity of the term "defraud" may not be apparent at first blush. "Fraud" and "fraudulent" are words so frequently employed by bench, bar and laity, that their precise meaning and exact import might superficially seem to be thoroughly established, and yet, upon inquiry and reflection, they and their congener, "defraud," will be found to embody mere abstract ideas, and are consequently devoid of specific significance, and are undefined and undefinable.

We will now quote from adjudged cases and standard text books, to fortify the soundness of the proposition thus stated.

In McAleer vs. Horsey, 35 Md., 439, 452, the Supreme Court of that state thus commented on the elusive import of the term under consideration:

"The common law not only gives *no definition of fraud*, but perhaps wisely asserts as a principle that there shall be no definition of it for * * * a technical definition of fraud, making everything come within the scope of the words before the law could deal with it as such, would be in effect telling the crafty precisely how to avoid the grasp of the law."

In volume 2, Parsons on Contracts (7th Ed.), page 769, it is observed:

"It is somewhat noticeable that the *common law* not only gives *no definition* of fraud, but perhaps asserts as a principle that there shall be no definition of it, and the reason of this rule is easily seen."

Adding that if a comprehensive definition were judicially given, the artful might devise means to elude it.

In Benjamin on Sales (Rev. Ed.), page 554, the learned writer observed:

"Courts and lawgivers have alike wisely refrained from *any attempt to define* with exactness what constitutes a *fraud*,

it being so subtle in its nature and so protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade."

Eddy on Combinations, volume 1, section 63, says:

"Courts very wisely refuse to be *bound* by any definition of fraud."

In Anderson's Law Dictionary, title "Fraud," page 475, the subject is, *inter alia*, commented on as follows:

"The common law asserts, as a general principle, that there shall be *no definition* of fraud."

And again:

"The term admits of *no positive definition*, and can not be controlled in its application *by fixed rules*."

In Bigelow on Fraud, volume 1, page 3, the author, *inter alia*, observes:

"It may be thought, and not without ground, to be both rash and dangerous to offer a definition of the term 'fraud.' * * * Judges have declined to attempt one, sometimes on the ground of its hopelessness, sometimes of supposed danger."

Even false representation, as an element of fraud, is not susceptible of strict definition. Thus, in Cyc. of Law and Proc., volume 20, page 14, it is said:

"No specific rule can be laid down as to what false representations will constitute fraud, as this depends upon the *particular facts* in each case."

Story, in his work on Contracts, section 546, declares that the terms "fraud" and "public policy" are each indefinable, observing that "public policy" "has never been defined by courts, but has been left *loose* and *free* of *definition*, in the same manner *as fraud.*"

In Perry on Trusts, volume 1, section 169, the text reads:

"No certain and accurate definition or description of *actual* fraud can be given. Courts have never laid down, in a general proposition, what does and what does not constitute fraud, nor any general rule by which they are controlled in giving relief, lest other means of committing fraud should be resorted to."

In Hobbs vs. Boatright, 195 Mo., 693, 715, the Supreme Court of that state thus expressed itself:

"A question of what is public policy in a given case is as *broad* as the question of what is *fraud* in a given case, and is addressed to the *good common sense of the court.*"

Further citation of authorities upon the general proposition now under consideration would be a waste of effort. All that is requisite is the application of the special subject to the case in hand.

"*Misera est servitus ubi jus est incognitum.*" quotes Judge Wilson, in his Discourses on Jurisprudence and Political Science, adding:

"When a citizen first knows the law from the jury who convicts, or from the judges who condemn him, it appears as if his life and his liberty were laid prostrate before a new and arbitrary power, and the sense of general safety, so necessary to the enjoyment of general happiness, is weakened or destroyed. But a law uncertain is so far a law unknown: to punish by a law indefinite and unintelligible! Is it better than to punish without any law?"

Wilson's Works, volume 2, page 374.

Again, in volume 1, page XXI, id., the learned judge adds:

"Simplicity and plainness and precision should mark the texture of the law. It claims the obedience; it should be *level to the understanding of all.*"

This court has expressly approved the principles thus announced by Judge Wilson, saying, in U. S. vs. Brewer, 139 U. S., 278, 288:

"Laws which create crimes ought to be so *explicit* that *all men* subject to their penalties may know what acts it is their duty to avoid. (Citing U. S. vs. Sharp, Pet. C. C., 118.) Before a man can be punished his case must be *plainly* and *unmistakably* within the statute. (Citing U. S. vs. Lacher, 134 U. S., 624.)."

Again, in U. S. vs. Reese, et al., 92 U. S., 214, 220, Waite, C. J., delivering the opinion of the court, said:

"If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

And on page 221, the chief justice added:

"It would certainly be *dangerous* if the legislature could set a net large enough to catch all possible offenders, and *leave*

it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the *judicial* for the legislative department of the government."

In U. S. vs. Comerford, 25 Fed., 902, 904, it is said:

"We have been taught to believe that it was the greatest injustice towards the common people of old Rome when the laws they were commanded to obey, under Caligula, were written in small characters, and hung upon high pillars, thus more effectually to ensnare the people. How much advantage may we justly claim over the old Roman, if our criminal laws are so obscurely written that one can not tell when he is violating them? If the rule contended for here is to be applied to the defendant, he will be put upon trial for an act which he could not by perusing the law have ascertained was an offense. My own sense of justice revolts at the idea. It is not in keeping with the genius of our institutions, and I can not give it my sanction."

The Court of Appeals of Kentucky, in Commonwealth vs. Adams Express Co., 97 S. W., 386, 387, happily expressed the thought under consideration in these terms:

"Crime is not to arise upon doubtful construction of a statute, where a person of *ordinary intelligence* reading the statute would not understand from it that the act was forbidden. Criminal statutes are not cunningly and darkly framed to catch the unwary."

One of the most venerable maxims of the common law may here be aptly invoked:

"*Ubi jus incertum ibi jus nullum.*"

The term "defraud" has repeatedly been adjudged to be vague and indeterminate from the standpoint of the *criminal* law when unaided by the context in a penal statute.

In U. S. vs. Cruikshank, 92 U. S., 542, 558, the significance of the term "defraud" was thus discussed:

"It is in some states a crime for two or more persons to conspire to cheat and defraud another out of his property; * * * to make such a purpose criminal the conspiracy must be to cheat and defraud in a *mode* made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal. (Citing State vs. Parker, 43 N. H., 83; State vs. Keach, 40 Vt.,

118; Alderman vs. The People, 4 Mich., 414; State vs. Roberts, 34 Me., 32.)."

When we turn to the cases thus cited with approval, we find, in State vs. Keach, 40 Vt., 113, 118, the following statement:

"These words ("cheat" and "defraud") have no signification which is exclusively criminal, or which may be regarded as technical or definitely settled. * * * The terms are *ambiguous*, and are as well applicable to injuries resulting from civil contracts as to those inflicted wholly by breach of criminal law. The purpose of 'cheating and defrauding' may embrace only such frauds as are the subject of a civil action, and does not necessarily import the commission of any known *common law or statute offense*."

In the case of State vs. Parker, 43 N. H., 88, this language will be found:

"It has there (referring to courts of Massachusetts, Maine, New York and Michigan) been decided that the words 'cheat and defraud' unexplained do not necessarily import anything forbidden by law, or unlawful, because there are certain cheats and frauds, properly so denominated in the language of ethical writers, and in conversation, which the law excuses and does not condemn."

To the same effect see

State vs. Roberts, 34 Me., 320.
Alderman vs. People, 4 Mich., 414, 433-434.
Com. vs. Shead, 7 Cush. (Mass.), 514, 515.

In Com. vs. Wallace et al., 16 Gray (Mass.), it was said:

"The charge of 'cheating and *defrauding*' does not necessarily import the commission of any indictable offense either at common law *or by statute*."

Hereafter, under an appropriate head, we will demonstrate that the term "fraud," when employed by a court of chancery, is a flexible, elastic word, being, in effect, a mere *nomen collectivum*, having no legal boundaries or limitations other than the discretion of the chancellor may see proper to prescribe as applicable to the facts in the special litigation before him. The subject is further mystified and beclouded, if that were possible, when the fact is borne in mind that the term "fraud" may have a different signification, when employed

in a criminal statute, than when the like term appears in an act relating solely to civil rights or remedies.

Thus, in Bishop's *New* Criminal Law, section 818, volume 2, it is said:

"Fraud, as a *civil wrong*, is not identical with *fraud* in the *criminal law*."

It is, of course, undeniable that, both at law and in equity, courts, time without number, have declared that the particular course of conduct then subjected to judicial scrutiny was fraudulent, but, upon principle and reason, such holdings are valueless as binding precedents or reliable guides upon a state of facts substantially variant from those involved in the case or cases where such result was announced, and one of our chief contentions in this argument will be that prior to the enactment of section 5440, or any other federal statute germane to this controversy, no adjudication, legal or equitable, ancient or modern, English or American, had ever pronounced as fraudulent agreements essentially similar to those here involved.

If, upon reflection, this court will be forced to assent to the correctness of the statement just made, then it follows, as a logical sequence, that any judicial holding to the effect that, upon common-law principles *only*, the acts involved in the case at bar, if consummated, would amount to a criminal defrauding of the United States, within the meaning of section 5440, would be tantamount to *judicial legislation* in its most extreme sense, inasmuch as the term "defraud" does not define itself.

We will now cite a number of decisions where the language employed in criminal statutes, no less certain in its essence than the term "defraud" in section 5440, was held void upon the express ground that it would be an *unconstitutional* exercise of authority *for the judiciary to define, wholly unaided by statute*, the acts necessary to constitute the offense inadequately attempted to be denounced by the legislature.

In Cook vs. State, 26 Ind. App., 278, 282, the words "narrow" and "broad tire" were held incurably void for uncertainty, no standard being fixed in the statute, the court saying:

"There must be some *certain* standard by which to determine whether an act is a crime or not."

In State vs. Mann, 2 Ore., 238, the words "gambling device" were held too uncertain to be given any effect in a criminal statute.

In Augustine vs. State, 41 Tex. Crim. App., 59, the words "mob violence" were likewise held void for uncertainty for the same reason.

The words "public indecency" were held fatally indefinite in a criminal statute of Indiana. See Jennings vs. State, 16 Ind., 335.

The phrase "disturbing a religious meeting" was held void for the same reason in Marvin vs. State, 19 Ind., 181.

In McConville vs. Jersey City, 39 N. J. Law, 38, the words "drove or droves of horned cattle," employed in a penal ordinance, were held void because of uncertainty as to the number of cattle intended.

See, also,

State vs. Partlow, 91 N. C., 550.

The most exhaustive and lucid exposition of the principle under consideration that we have discovered, will be found in State vs. Gaster, 45 La. Ann., 636, 639, 640, and we bespeak the careful reading of the opinion in that case as a masterpiece of unanswerable judicial reasoning. The statute there under consideration declared that if any of certain enumerated civil officials should commit "any misdemeanor in the execution of their respective offices," certain penalties should be inflicted, and the court held that this was, in effect, an attempted delegation to the judiciary to define the constituent elements of a criminal offense, and hence unconstitutional.

The opinion is too lengthy to cite from *in extenso*. We give a few excerpts, disclosing the basic principles upon which the conclusions there announced were reached. *Inter alia*, it was said:

"All crimes in Louisiana are statutory (likewise true of federal government), and there can be no crime which is not *defined* and denounced by *statute*. The determination and definition of acts which are punishable as crimes *are purely legislative* functions, which *can not be delegated* to, or *exercised* by, the *judiciary*. This statute denounces as a crime, on the part of civil officers, 'any misdemeanor in the execution of their respective offices.' It does not, on its face, undertake to define, in any

manner, what acts are misdemeanors in office, and, unless there is some *other* law which furnishes such definition, there is no other source to which we may look for it, except to the discretion of the judiciary * * *. This would operate as a *delegation* to the *judiciary* of powers purely legislative, in flagrant violation of the constitutional prohibition."

Further on, in the opinion, the court remarked:

"Who, then, is to determine what particular acts constitute a criminal 'misdemeanor in the execution of an office?' We can discover no authority to which we may look, except to the judges, who are left at liberty to select such guides as they choose, and decide according to their discretion."

And for this reason the court reiterated the statement that such a statute was a violation of the Constitution of the state, as it virtually amounted to a delegation to the judiciary of legislative functions.

A rehearing was allowed, upon which the court adhered to its original holding.

45 La. Ann., 645-6.

The views so trenchantly expressed by the Supreme Court of Louisiana find a responsive echo in the impressive language of Chief Justice Marshall in Osborne vs. Bank, 9 Wheaton, 739, 866, where that great jurist said:

"Judicial power is never exercised for the purpose of giving effect to the *will of the judge;* always for the purpose of giving effect to the will of the *legislature;* or, in other words, to the will of the law."

Under these fundamental principles of constitutional law, and in the light of the vague and uncertain import of the term "defraud," how can such word (unaided by further legislation) be judicially applied in a criminal prosecution under section 5440, without, in the language of Judge Marshall, giving effect solely "to the will of the judge?"

Therefore if the statute assumes to authorize the federal courts to expound and define its significance, it amounts to a legislative delegation to the judiciary to declare the essential elements of a criminal offense, and hence should be held invalid, as contravening the fundamental law of the nation.

V.

Constitutional objections to the "defraud" clause of section 5440.

Suppose section 5440 read:

"If two or more persons conspire * * * to defraud the United States in any manner or for any purpose * * * the parties to such conspiracy shall be punishable * * *. *And in every prosecution hereunder the court shall be vested with discretionary power to adjudge whether the acts contemplated to be committed would, if consummated, amount to a defrauding of the United States.*"

Would not the trained legal mind unhesitatingly denounce such enactment as palpably invalid? First: Because violative of section 1, article I, federal Constitution, which expressly imposes on congress the exercise of "*all*" legislative powers. Second: Because it would conflict with the *spirit*, if not the letter, of article I, section IX, chapter 3, id., which forbids "*ex post facto*" laws. Third: Because, viewed as a penal statute, it would not contain any adequate definition of the crime sought to be denounced or any designation of the acts falling within its ban.

We venture to observe that the question thus propounded admits of none other than an affirmative answer.

And section 5440, as it stands on the statute books, by necessary implication and legal effect, is to all intents and purposes identical with the enactment above suggested, and the logic of the position of government counsel inevitably leads to such result.

A recent decision of the Supreme Court of Colorado affords an apposite illustration of the invalidity of the suggested character of legislation. An amendment to the Constitution of that state reads:

"The general assembly shall provide by law * * * for a period of employment not to exceed eight (8) hours within any period of twenty-four (24) hours * * * for persons employed in * * * any * * * labor that the general assembly may consider injurious or dangerous to health, life or limb."

The legislature, in attempting to conform to this constitutional mandate, enacted a penal statute, declaring that "all paper mills * * * shops of all kinds and stores may be

held to be unhealthful and dangerous occupations within the meaning of this act, *at the discretion of the court.*"

In Burcher vs. People, 93 Pac., 16-17 (Colo.), the Supreme Court commented on this statute as follows:

"This is a palpable evasion of duty, coupled with an *abortive attempt* to give to the *courts* legislative power to make crimes and misdemeanors out of acts which are not in violation of any *valid* enactment."

We, therefore, invoke the foregoing cited provisions of the federal Constitution, in bar of judicial power to here enforce the "defraud" clause of section 5440, unaided by other legislation specifically denouncing the conduct under review as fraudulent. In this behalf we also rely upon the fifth amedment to that instrument which declares "No person shall * * * be deprived of life, *liberty* or property without *due process of law.*"

And these fundamental requirements exact, as a condition precedent to the maintenance of a criminal prosecution, that some act of congress must exist *which in and of itself clearly defines as a crime the particular conduct sought to be penalized,* and as additional authority in that behalf, we cite:

State vs. Bates, 14 Utah, 293-300.
A. & E. Ency. of Law (2d Ed.), volume 10, pages 303-4.
Cooley's Const. Lim. (7th Ed.), 163.

In passing from this branch of the discussion it may not be amiss to add that the words "fraud," "defraud" or "fraudulent" when employed in a pleading, even in a civil suit, are respectively universally regarded as a statement of a mere legal conclusion, and not descriptive of any actionable fact or facts whatsoever.

Among the many authorities announcing this rule, we may cite:

Kerr on Fraud and Mistake, page 366.
Ambler vs. Choteau, 107 U. S., 586-591.
Fogg vs. Blair, 139 U. S., 118-127.
Lumley vs. Ry. Co., 71 Fed., 21, 27, 28.

In Cella vs. Brown, 144 Fed., 742, 754 (C. C. A., 8th Circuit), the use of the word "fraud" in a pleading was treated as

"a mere *brutum fulmen*. It states no facts * * * is but a conclusion of law."

As a conclusion of law is a mere judicial inference or deduction of legal rights or obligations arising from the particular statement of facts which may be set forth in a pleading, we may well inquire by what legal alchemy do the terms "fraud" or "defraud," employed in a penal statute, acquire any greater efficacy for purposes of definition than when used in a pleading in a *civil* action?

After a very careful analysis of the various federal decisions, by courts both inferior and supreme, where prosecutions upon a particular state of facts have been sustained under section 5440, we have failed to discover any instance wherein the inefficacy of the term "defraud," as a statutory definition of a crime, has ever been *pointedly called to the attention of any national court*. And while it may be now too late to here successfully invoke a holding that the term "defraud" should, for the foregoing stated reasons, be wholly rejected as an element of the section, nevertheless, the arguments above advanced and authorities cited seem to us to justify, if not require, this court to hold that before the word "defraud" can be given any force or effect in a prosecution under section 5440, some *independent federal statute* must exist, *which in and of itself* clearly and expressly denounces the particular conduct or combination involved in this prosecution *as a fraud* upon or against the United States.

It is, therefore, necessary for the prosecution to point out some federal statute other than section 5440 wherein the contracts set out in the indictment as the groundwork thereof are condemned in such terms that if the end sought to be attained were accomplished, a criminal fraud would thereby be perpetrated upon the United States, within the correct meaning of the word "defraud" employed in such section.

Counsel for the government claim that the provisions of the coal land act furnishes the needed supplemental legislation in that behalf, but this position we confidently assert is untenable, as we will presently undertake to demonstrate.

VI.

Conspiracy, as a common law offense, is not cognizable in the federal courts, and the word "defraud," being of uncertain import, resort can not be had to that system of jurisprudence to determine its meaning.

We have already discussed the proposition that the *criminal* jurisdiction of the federal courts is exclusively statutory, and we will now briefly consider a doctrine sometimes applied in statutory construction, and which may be urged by opposing counsel, viz.: That where a federal statute contains a word or phrase borrowed from common-law nomenclature, the meaning thereto given is presumed to be adopted by congress.

But such principle, we venture to observe, is subject to this positive qualification, that before the common law can be resorted to for such purpose, the word or phrase in question must have there received a *settled definite* judicial interpretation. Otherwise, the rule is inapplicable.

In volume 2, Lewis' Sutherland Statutory Construction, section 398, the text reads:

"Where a statute uses a word, which is well known and has a *definite* sense at common law or in the written law, without defining it, it will be presumed to be used in that sense * * *. Words having a *precise and well settled meaning* in the jurisprudence of a country are to be understood in the same sense when used in statutes, unless a different meaning is unmistakably intended."

Like views were expressed by this court in U. S. vs. Smith, 5 Wheat., 154, 160, where Mr. Justice Story, speaking for the court, remarked:

"Congress may as well define by using a term of a *known* and *determinate* meaning, as by an express enumeration of all the particulars included in that term. That is certain which is by necessary reference made certain."

It will be noted that Mr. Justice Story uses the expression "determinate," in the excerpt above given, and standard lexicons treat the word as the exact equivalent of "definite," "certain," "precise."

The application of this doctrine to the case at bar is that the word "defraud," in a criminal sense, having no defined or certain meaning at common law—indeed, having been repeat-

edly held to be an ambiguous term—such law affords no aid in arriving at the import in which it is used in section 5440.

The word "defraud," as heretofore abundantly shown, being a mere generic or abstract expression, to be applied or rejected in particular cases in civil actions at the pleasure of a practically unlimited judicial discretion, it is, in effect, *undefined*, and the common law is consequently valueless as a reliable index to the legislative intention.

We are therefore remitted to an examination of the federal statutes (wholly independent either of section 5440, or of the principles of the common law) in order to ascertain whether the contracts forming the basis of the pending prosecution have been thereby expressly denounced as a fraudulent combination against the United States.

VII.

The provisions of the coal land act of 1873, sections 2347 to 2352, inclusive, U. S. R. S., afford no warrant for the pending prosecution.

The *only* federal statute having any conceivable relevancy to the supposed criminality of the contracts forming the basis of the alleged conspiracy set out in the indictment herein, is the coal land act of March 3, 1873, and now comprising sections 2347 to 2352, both inclusive, R. S., U. S. These sections constitute the sole existing legislation of the federal government, bearing upon the subject of coal land entries or purchases, and they have remained legislatively unmodified in any particular from the date of their enactment.

An epitome of these sections is herewith given.

Section 2347 grants the right to every citizen of the United States, of the age of twenty-one years, or person who has declared his intention to become such, to enter and purchase not to exceed 160 acres of vacant public coal lands, upon the payment of a specified price per acre. No settlement, occupancy, or other act than the mere payment of the necessary purchase money by the entryman, is exacted by this section. An association, the members of which are similarly severally qualified, is authorized by the section to purchase, at the like price, not to exceed 320 acres of such lands.

Section 2348 grants to any person or association, severally qualified as provided in section 2347, the *preference right of entry* of the prescribed quantity of coal land, provided actual possession by the entryman is taken of the property, and a coal mine or mines is opened upon and improved thereon. An association, however, consisting of *not less than four* persons, is granted a preferential right of entry and purchase, to the extent of 640 acres, provided that not less than $5,000 is expended by such association in working and improving a coal mine or mines on the property purchased.

Section 2349 fixes the period within which preferential claims of right of entry under section 2348 are to be filed in the land office of the proper district.

Section 2350, in its entirety, reads as follows:

"The three preceding sections shall be held to authorize only one *entry* by the *same person* or *association* of *persons;* and no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section 2348 shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims, and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant."

Section 2351 provides that in case of conflicting claims under section 2348 right of entry shall be allowed to the person having priority of possession and improvement, followed by a proper filing and continuous good faith. The section than authorizes the commissioner of the general land office to issue all needful rules and regulations for carrying into effect the provisions of the act.

Section 2352 reserves, from the operation of the act, lands "valuable for *mines* of gold, silver or copper."

The foregoing synopsis covers every essential feature of the coal land act, in whole or part.

It will be observed that the act is *absolutely silent* on the question of whether a qualified entryman may or may not lawfully contract, prior to entry, to convey the land he designs entering, to another. There is a clear *casus omissus*, so far as *express* legislation is concerned, touching the subject of the lawfulness or unlawfulness of such contracts.

The only limitation contained in the entire act is that "only one entry" is authorized thereby to be made by the "*same*" person or association of persons, and the word "entry," as thus employed, has long since acquired a precise legal signification.

In Parsons vs. Venzke, 164 U. S., 89, 92, the court thus defined what constitutes an "entry:"

"An entry is a *contract*. Whenever the local land officers approve the evidences of settlement and improvement, and *receive the cash price*, they issue a receiver's receipt. Thereby a *contract* is entered into between the United States and the preemptor, and *that contract is known as an entry*. It may be, like other contracts, voidable; and is voidable if fraudulently and unlawfully made. * * * When, by due proceedings in the proper tribunal, the entry is set aside and canceled, the contract is also terminated. The voidable contract has been avoided. There is no longer a contract, no longer an entry."

This perspicuous language admits of but one interpretation, and that is: That whenever a person appears before a United States land office, and there observes the usual formalities incident to the final purchase of a given tract of land, under any of the public land laws, and in connection therewith pays the stipulated price for the property, and the receiver of the land office thereupon issues to him the receipt for the purchase money, a contract is thereby entered into between the United States upon the one hand and the person paying such purchase price and in whose name the receipt issues on the other, and such contract is an "entry."

It may be that some provision of the law applicable to such entry may have been violated in a sense which would make it illegal, and hence voidable at the election of the government, but, nevertheless, whether the transaction be voidable or not, the only person with whom the government deals and contracts is the person in whose *name* the land is entered or purchased, and to whom the receiver's receipt is issued.

Let it be conceded, arguendo, that by a process of *liberal* judicial construction the *policy*, though not the *letter* of the coal land act impliedly prohibits an entryman from making an entry for the use and benefit of another, especially where the latter had already exhausted his own right to directly purchase from the government thereunder, nevertheless, the person with whom the entryman may have so contracted is not the one who makes the "*entry*," and it is an abuse of terms to designate the former as one making an "entry" within the *letter* or *express* language of the coal land law.

That the word "entry" has a technical meaning, and applies only to the formal proceedings, culminating in the payment of the requisite purchase price to the government for the lands desired to be acquired, is a principle the correctness of which is set at rest by repeated federal adjudications.

See:

Hastings, etc., vs. Whitney, 132 U. S., 357, 363.
McFadden vs. Mountain, etc., Co., 87 Fed., 154, 156.
Stearns vs. U. S., 152 Fed., 900, 907.
Kansas Pac. Co. vs. Dunmeyer, 113 U. S., 629-38.

See, also, Lockwitz vs. Larson, 16 Utah, 275-279, where the Supreme Court of Utah, after reviewing all previous decisions upon the subject, in discussing the meaning of the terms "entry" and "enter," said:

"When, then, these terms are used with reference to laws concerning the private sale of the public lands of the United States, they have a fixed and definite sense in the legal nomenclature of this country * * * and their technical meaning will not be changed by construction."

The coal land act, being *wholly silent* touching the lawfulness or unlawfulness of contracts such as those forming the basis of this prosecution, and the *only limitation* contained in the act being that the "*same person*" should be allowed only "*one entry*" under the law, and there being no claim or pretense that any of the entrymen whom the alleged conspiracy contemplated should respectively make the entries mentioned in the indictment, had ever theretofore entered or made an "entry" of coal lands, there was no letter or express provision of the law contemplated to be violated in any particular whatsoever in the consummation

of the supposed conspiracy. Therefore, the contracts forming the sole basis of this prosecution are not denounced by the letter or express terms of the coal land act as illegal, fraudulent, or in any manner prohibited, and for the judiciary to denounce such contracts as a *criminal* conspiracy, will be the creating of a crime by purely judicial construction or implication, and constructive crimes, as this court has expressly held, are unknown to federal criminal jurisprudence.

Todd vs. U. S., 158 U. S., 282, and other cases on this point, cited *supra*.

Government prosecutors in recent days have been prone to indulge in epithets of unpleasant import, such as "dummies," "corporation hirelings," etc., to characterize the status of coal entrymen under contracts similar to those in controversy. In so doing, they have ignored the truism: "Invective fills no office in the process of reasoning."

The use of these appellations, however, has tended to mislead and prejudice the public mind, thereby obscuring the real nature of the transactions.

An entryman who exhausts *his own right* to purchase coal lands accorded him by law, though in pursuance of a contract made before entry, to subsequently convey the tract purchased to another, for a consideration satisfactory to the entryman, is neither a "hireling," nor a "dummy," in legal parlance. His status is that of a person contracting to sell land after acquisition of title thereto, when, at the time of entering into the agreement, he is clothed with the lawful right to secure such title.

Whether the consummation of the contract upon the theory of public policy may, or may not, involve a transaction impeachable in equity at the suit of the United States, does not in either event justify the use of the quoted opprobrious terms, nor do their employment in argument legitimately aid the court in determining the validity of such contracts from a *penal* point of view.

VIII.

The letter of the coal land act not forbidding the entering into of the contracts set out in the indictment, the making thereof can not constitute criminal conduct or form the basis of a charge of criminal conspiracy to defraud the United States, as both the LETTER as well as the SPIRIT of a criminal statute must be violated in order to create penal liability.

Having shown, as we think, conclusively, that the letter of the coal land act (whatever may be said about the policy thereof) does not inhibit the contracts in question, much less expressly declare that the entering into thereof should constitute a fraud upon the United States, it can not be utilized in aid of the pending prosecution.

The fundamental principles of the common law prohibit the enlargement of the LETTER of a statute by construction, for the purpose of entailing penal consequences upon a citizen.

"Section 5440 creates an infamous crime." (Mackin vs. U. S., 117 U. S., 348.) And is "highly penal." (France vs. U. S., 164 U. S., 676, 682.) And this court said, in the latter case, that for such reasons it was compelled to construe it "strictly," and this language was also applied in that instance to an auxiliary statute, forming, jointly with section 5440, the basis of the then pending prosecution. It was also said, in the same case, that a "narrow" construction of the statute should be given in favor of the defendant.

A few of the multitude of cases, decided by this and other courts, on the subject of the necessity of strict construction of a penal statute against the government, and a liberal exposition thereof in favor of the defendant, resulting in the proposition which has become crystalized into a legal axiom, that "no conduct will be held criminal unless both the *letter* as well as the spirit of the law has been violated," will now be called to the attention of the court.

In Harrison vs. Vose, 9 How., 373-378-9, Mr. Justice Woodbury, speaking for the whole court, said:

"The proof must, then, bring a transaction within the spirit as well as *letter* of the law, and must usually show a plain breach of both."

Again, this court, in Sarlls vs. U. S., 152 U. S., 570, 576, quoted with approval from State vs. Moore, 5 Blackf., 118, where it was said :

"This is a penal statute and must receive a strict construction. We are not at liberty to extend its meaning beyond its *exact literal* sense."

In the subsequent case of U. S. vs. Harris, 177 U. S., 305, 310, this court cites the Sarlls case as a precedent suporting the doctrine of strict construction under consideration, and quotes at length from the leading case of U. S. vs. Wiltberger, 5 Wheat., 76, where Chief Justice Marshall, in speaking of the rules of construction applicable to penal statutes, *inter alia*, said:

"It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. *If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.*"

In France vs. U. S., 164 U. S., 676, 683, Mr. Justice Peckham, speaking for the court, said:

"If it be urged that the act of these plaintiffs in error is within the *reason* of the statute, the answer must be that it is so far outside of its *language* that to include it within the statute would be to legislate and not to construe legislation."

To same effect see

Bishop on Statutory Crimes, section 220.
Endlich on Interpretation Stat., page 455.
Potter's Dwarris' Stat. & Const., page 247.

The doctrine of inelasticity of criminal statutes was forcibly exemplified by this court in James vs. Bowman, 190 U. S., 127; U. S. vs. Reese, 92 U. S., 214, and U. S. vs. Fox, 95 U. S., 670, where in each instance penal legislation was held invalid upon the specific ground that the language contained therein was broad enough to cover subjects without, as well as those within, the constitutional powers of congress, though in so doing the court, in effect, treated as inapplicable the familiar

canon of statutory construction that if necessary to uphold the constitutionality of a *remedial* act, general language employed therein will be limited by judicial interpretation to matters within the constitutional cognizance of the legislature.

To us, speaking with all due modesty and deference, it seems as clear as a mathematical demonstration that inasmuch *as* the letter or *express language* of the coal land act *in nowise declares unlawful or fraudulent the making of the contracts upon which the present prosecution rests, this court can not*, without violating fundamental principles of statutory construction, applicable to penal liability, enlarge the letter of the act by construction, so as to make criminal, contracts only violative, at most, of some *unexpressed* policy or supposed latent intent of the law making power.

In leaving this branch of the discussion, we have not overlooked the words in section 5440, which read:

"To *defraud* the United States in any manner or for any purpose."

The words "in any manner or for any purpose" do not impair in any particular the soundness of our argument. The core, the essence of the crime denounced by the section, at last is, that in some manner and for some purpose a conspiracy to *defraud* the government was entered into.

Those words really add nothing to the section, and the construction proper to be placed thereon would be the same were they wholly omitted therefrom.

The Circuit Court of Appeals of the First circuit, in Grunberg vs. U. S., 145 Fed., 81, 84, expressly sanctioned the views above expressed, saying:

"The words 'in any manner or for any purpose' * * * are mere surplusage."

IX.

The contracts forming the basis of this prosecution would be legal and enforcible at common law.

The alleged conspiracy, reduced to its ultimate essentials, contemplated this, and nothing more—that persons who were lawfully entitled to purchase coal lands from the United States, should be induced by the defendants to make purchases of such

property, ostensibly for themselves, to the extent the statute allowed, paying the prescribed purchase price, coupled with agreement antecedent to entry, that the defendants should advance the requisite moneys in that behalf, and for an agreed consideration the purchasers from the government should, in each case, after entry convey the property purchased to the defendants or some one to be designated by them.

That *all interests*, inchoate or vested, to, in or concerning lands, public or private, are *assignable, in the absence of an express prohibitory statute*, is a doctrine sanctioned by this court and text writers generally.

In Smelting Co. vs. Kemp, 104 U. S., 636, 651, Mr. Justice Field, speaking for the court, said:

"Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary."

An instructive illustration of the point under discussion will be found in Maxwell vs. Moore, 22 How. (U. S.), 185. Concisely stated, the facts there involved, and the law applicable thereto, were as follows:

The act of May 6, 1812, 2 Stats. L., 728, granted to every regular soldier of the War of 1812 the right to select as a bounty a tract of public land not exceeding 160 acres in amount. The fourth section of the act contained the following express prohibition:

"No claim for the military land bounties aforesaid shall be assignable or transferable in any manner whatever until after a patent shall have been granted. * * * All sales, mortgages, contracts or agreements of any nature whatever, made prior thereto, for the purpose or with the intent of alienating, pledging or mortgaging any such claim, are hereby declared and shall be held null and void."

Pursuant to this act, one, Allen McVey, duly located 160 acres of public lands in the then territory of Arkansas, and received a patent therefor. By a subsequent act, passed May 22, 1826, 4 Stats. L., 190, it was in substance provided that any soldier to whom bounty land had been patented in the territory of Arkansas, and which proved unfit for cultivation, etc., might relinquish the patented tract to the United States, and enter a like quantity of land, in lieu thereof, in said territory. This

act did not contain the *prohibition against alienation* expressed in the previous statute.

McVey surrendered his patent, under the act of 1826, with the view of thereafter making a lieu selection, as authorized thereby. Previous to the making of his lieu selection, McVey gave to one, Pelham, a bond, to convey to him the land which might be thereafter selected, pursuant to such relinquishment, together with a power of attorney, enabling Pelham to locate the selection and obtain patent thereon.

McVey died before a selection was in fact made, and some six years subsequent to his death Pelham, in the name of McVey, located and entered a tract of 160 acres, as a lieu selection.

The validity of the bond, power of attorney, and selection so made, was passed upon by this court, and each and all of them were expressly upheld, the court saying, in that behalf, on page 191:

"It is insisted that the acts of 1812 and 1826 are on the same subject, must stand together as one provision, and the last act carry with it the *prohibition* found in the first. We are of the opinion that the acts have no necessary connection; that there was no good reason why the soldier who removed to Arkansas, and inspected his tract of land, then patented, and alienable, *should not contract to convey the tract he might get in exchange*. We can only here say, as we did in the case of French vs. Spencer, 21 How., 238, that the act of 1826 is plain on its face and single in its purpose, and that in such cases the rule is that where the legislature makes *a plain provision, without making any exception*, the courts of justice can make none, as it would be legislating to do so."

In Gilbert vs. Thompson, 14 Minn., 544, the Supreme Court of that state construed the force and effect of the act of congress of July 17, 1854, providing for the issue of Sioux Half-Breed Scrip, and authorizing the location of public lands thereunder, the act containing the following express prohibition:

"That no transfer or conveyance of said certificates or scrip shall be valid."

Scrip was issued to one, Monette, a half-breed Sioux Indian, pursuant to the provisions of the act, and before any selection or location of land was made, the half-breed executed a power of attorney, authorizing the location or se-

lection of land thereunder by her attorney, and likewise empowering said attorney to sell and convey the lands which might be entered, pursuant to such location. She also transferred and delivered the scrip at the same time to enable the designated attorney to make the selection and conveyance so authorized, the real intent of the entire transaction being to enable one, Foster, to become the owner of the scrip, as well as the land which might be selected pursuant thereto. Conformable to the power of attorney, the scrip was located on a tract of public land, and a conveyance thereof made to said Foster for the purpose of carrying into effect such original design and purpose.

The validity of the title to the land thus selected and conveyed to Foster was expressly upheld by the court, it being, *inter alia*, said, in that behalf, page 546:

"*In the scrip itself* the half-breed had nothing which he could transfer to another, but his title to the land, when perfected under it, was as absolute as though acquired in any other way. It follows that any attempt to transfer the *scrip*, directly or indirectly, would be of no effect as a transfer. The title to the scrip would remain in him, and the title to the land acquired by it would vest in him, just as though no such attempt had been made. Such attempt to transfer would not involve any *moral turpitude*, nor the breach of any legal duty, as is the case with an attempt to transfer a pre-emptive right. It would be simply ineffectual, because the scrip is not transferable. * * * but a simple *power to sell*, executed by a half-breed, is good till revoked, and *would extend to land subsequently acquired by means of scrip*, if such land came within its terms."

In short, the court held that though the assignment of the *scrip* was expressly prohibited by the act of congress, nevertheless, the power of attorney authorizing the location thereof in the name of the half-breed, and further authorizing a conveyance (of the tract to be located) after selection, would operate to legally empower the attorney to make such selection and conveyance, if the letters of attorney were not revoked before the execution of the deed thereunder, and that, in the absence of such revocation, the title of the grantee under the deed executed by the attorney would be valid, notwithstanding the fact that the entire transaction, from its inception, contemplated the vesting of such title in him.

In Myrick vs. Thompson, 99 U. S., 291, 296-7, this court *expressly approved the ruling so made* by the Supreme Court of Minnesota, in these words:

"Holders of such certificate or scrip were forbidden to transfer the same, and the defendants contended that the real object of the agreement was to effect a transfer of the same; but the state Supreme Court overruled the defense, and referred to one of their former decisions, assigning the reasons for their conclusion that the defense was not well founded. Gilbert vs. Thompson, 14 Minn., 544.

"Since the cause was submitted, the opinion of the court in that case has been carefully examined, and the court here concurs with the state court that the case is applicable to the present case, and that the reasons given for the conclusion are satisfactory and conclusive."

It will be observed that this court, in the most unequivocal terms, upheld a transaction, which, to some extent, at least, seems to savor of an attempted evasion of the prohibition against assignment contained in the act of congress there considered.

The rule relating to the right of assignment of inchoate interests in real property is thus stated by an eminent writer:

"Equity * * * has also given effect to assignments of every kind of *future* and contingent interests and possibilities in real and personal property, when made upon a valuable consideration. As soon as the assigned expectancy or possibility has fallen into possession the assignment will be enforced."

Pomeroy's Eq. Jur. (3d Ed.), section 168.

Courts of equity "support assignments, not only of choses in action, but of contingent interests and expectancies, and also of things which have no present actual or potential existence, but rest in mere possibility only."

Mitchell vs. Winslow, 17 Fed. Cases, 527-531.

We deem it unnecessary to cite further authorities, as the correctness of the proposition here contended for is recognized by a practically unbroken line of decisions.

X.

The contracts assailed by the indictment would not furnish the basis for a common-law criminal conspiracy.

With all possible brevity, we will give a historical sketch of the law of conspiracy, viewed in its criminal aspect, from a

common-law standpoint, and then apply such law to the salient facts disclosed by the indictment, for the purpose of maintaining the soundness of the proposition that, under correct common-law principles, no indictable conspiracy is charged against the defendants in error.

If we are successful in such behalf, *a multo fortiori*, no facts are charged adequate to constitute a criminal conspiracy under the provisions of section 5440.

Lord Coke thus defines conspiracy:

"A consultation and agreement between two or more to appeal and indict an innocent person falsely and maliciously of felony, whom accordingly they cause to be indicted or appealed, and afterwards the party is lawfully acquitted by the verdict of twelve men."

3 Inst., 143.

The definition of conspiracy, as thus given, is substantially in accord with the terms of the statute 33 Edward I., commonly designated as "Ordinance of Conspirators."

In Jacob's Dictionary, title "Conspiracy," the like definition of the offense is set forth.

In Black's Law Dictionary, an American glossary, a similar definition of conspiracy is given.

In Hale's Pleas of the Crown the offense of conspiracy is not even mentioned.

In Blackstone's Commentaries, Book 4, page 136, the crime of conspiracy is limited to combinations designed to falsely and maliciously procure the indictment of an innocent man for a felony.

And this court, in Schick vs. U. S., 195 U. S., 65, 69, accepts Blackstone's Commentaries as the highest evidence of the common law, saying:

"Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly the framers of the Constitution were familiar with it."

Judge Wilson, in his Discourses on Jurisprudence and Political Science, treats the crime of conspiracy as limited to combinations to falsely accuse and procure the indictment of

innocent persons, thus adopting Blackstone's definition of the offense. See volume 2, Wilson's Works (Andrews), page 429.

Judge Wilson was among the first judges appointed by President Washington as associate justice of the Supreme Court of the United States, and upon whom Judge Cooley pronounced the encomium: "The ablest and most learned of the associates."

A careful examination of the isolated instances where the English courts, *prior to the beginning of the 19th century*, upheld prosecutions for conspiracy under a state of facts not included within the limited exposition of the scope of that offense as given by Coke, Blackstone and other sages of the common law will be found mainly, if not altogether, limited to cases where either the end or the means involved in the conspiracy charge, was, *per se*, criminal by virtue of some substantive rule of the common law or penal statute.

It is thus made apparent that the prevailing definition of "conspiracy" at the present time, viz.:

"A combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose, not in itself criminal or unlawful, by criminal or unlawful means"

is a modern innovation and enlargement, by a process of judicial legislation, upon the *true* common-law rule.

The modern, expanded, judicial conception of conspiracy first found utterance in England by the dictum of Lord Denman, in Rex vs. Jones, 4 B. & Ad., 345, 348-349, decided in 1832.

And in the United States, in effect a similar doctrine was first expounded by the Supreme Court of Maryland in State vs. Buchanan, 5 H. & J., 259, decided in 1821.

The case of Comm. vs. Hunt, 4 Met., 111 (Mass.), referred to by this court in the Pettibone case, *infra* (148 U. S., 197), was not decided until 1842.

The modern cases, expanding the doctrine of conspiracy, so as to include virtually whatever a court may see proper to declare to be an *unlawful* object, is bitterly assailed in Eddy on Combinations, volume 1, section 353, as follows:

"**The strict definition is fair and just.**—Decisions to the contrary notwithstanding, it is not consistent with either English or American notions of justice that it should lie in the varying and whimsical discretion of the court or jury to hold men as criminals for simply combining to do that which is not criminal

by means which are not criminal. There is little to be said by way of answer to the following by the late Sergeant Talford: 'It is not easy to understand on what principle conspiracies have been holden indictable, where neither the end nor the means are in themselves regarded by the law as criminal, however reprehensible in point of morals.' "

And in section 354, id., it is said:

"It is a dangerous extension of the power of the courts in the administration of the criminal law to say that an individual may do certain things and not be liable criminally, but if he leans over his fence and talks with his neighbor, and asks his neighbor's help, both are immediately subject to indictment, not for doing or attempting to do anything, but for agreeing to do together that which either could do separately—the agreement is criminal, though none of the acts contemplated are."

In Wharton's American Criminal Law (9th Ed.), volume 2, section 1338, it is, *inter alia,* said:

"It is essential to the constitution of an indictable offense as is elsewhere shown, that it should be prohibited either by statute or by common law; but conspiracies to commit, by non-indictable means, non-indictable offenses, if we resolve them into their elements, are neither prohibited by common law nor by statute."

In Wright on Criminal Conspiracies, page 48, the author sums up his investigation on the subject as follows:

"It is conceived that on a review of all the decisions there is a great preponderance of authority in favor of the proposition that, *as a rule,* an agreement or combination is not criminal unless it be for acts or omissions (whether as 'ends' or as 'means') which would be criminal apart from agreement."

It will thus be seen that by the common law of England, as understood and settled at the time of the American Revolution, a combination of two or more persons to do an act, neither criminal as to object, nor criminal as to means designed to be employed, did not constitute an indictable offense, and when federal courts seek to ascertain the status of the common law on a given subject, they accept such law as expounded and settled by the decisions of the English courts, *prior to and not after* the separation of the thirteen colonies from the mother country.

This is the rule as declared in the A. & E. Ency. of Law (2d Ed.), volume 6, pages 279, 280, where the subject is summed up as follows:

"**Effect of English decisions.**—a. Rendered Prior to the American Revolution.—English decisions are freely used in deciding cases in the federal and state courts in the United States, and are deemed of great value in these tribunals; and where such decisions were rendered *prior* to the war of the Revolution they form a part of the common law of the United States, and are binding upon American courts.

"Should Be Well Established.—But though binding, they do not constitute the law itself, but are only evidence of what the law is, and, hence, should be *clear* and *unequivocal*.

"b. Rendered *Subsequent* to the American Revolution.—On the other hand, it is equally well settled that decisions of English courts rendered *since* that time, though entitled to respect, and at times regarded as persuasive, are *not authoritative*, and will be disregarded should the exigency so require."

This court, in Cathcart vs. Robinson, 5 Peters, 264, in determining what weight should be attached to *modern* English decisions antagonistic to the *earlier* adjudged cases in that country, *inter alia*, said:

"If the English courts vary their construction of a statute which is common to the two countries, we do not hold ourselves bound to fluctuate with them. At the commencement of the American Revolution the construction of the statute of 27 Eliz. seems not to have been settled. * * * There is some contrariety and some ambiguity in the old cases on that subject, but the court conceives that the modern decisions establishing the absolute conclusiveness of a subsequent sale to fix fraud on a family settlement, made without valuable consideration—fraud not to be repelled by any circumstances whatever—go beyond the construction *which prevailed at the American Revolution, and ought not to be followed*."

In Roscoe's Criminal Evidence, volume 1 (8th Ed.), page 565, the author sums up the *modern doctrine* touching what combinations are judicially regarded as criminal conspiracies. He groups them under three heads:

First: "Conspiracies to commit crimes."

Second: "A combination to commit a civil injury is an indictable conspiracy in many, though it is *impossible* to say precisely in what, cases."

Third: "Combinations to do acts which the courts regard as outrages on morality and decency, or as dangerous to the public peace, or injurious to the public interest, have in many cases been held to be conspiracies."

The author then adds:

"The *vagueness* of the *second* and *third* of these propositions leaves so broad a discretion in the hands of the judges that it is hardly too much to say that plausible reasons may be found for declaring it to be a crime to conspire *to do almost anything* which the judges regard as morally wrong or politically or socially dangerous. The power which the vagueness of the law of conspiracy puts into the hands of the judges is something like the power which the vagueness of the law of libel puts into the hands of the juries."

Mr. Sergt. Talford, in his Edition of Dickinson's Sessions, discusses the subject of conspiracy thus:

"The offense of conspiracy is more difficult to be ascertained than any other for which indictment lies, and it is indeed rather to be considered as governed by *positive decisions* than by any consistent and intelligent principles of law."

XI.

The term "unlawful," as an element of the modern judicial definition of "conspiracy," means unlawful in a CRIMINAL and not merely in a civil sense.

This court, in the Pettibone case, 148 U. S., 197, 203, quoted the *modern judicial definition* of conspiracy as given by the Supreme Court of Massachusetts, where it was said:

"A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

But neither the Supreme Court of Massachusetts nor this court assumed to expound the significance of the word "unlawful" in that connection, and we will now present the authorities upon that topic.

In Wright on Criminal Conspiracy, page 50, the author, in combating the theory that the term "unlawful" (as used by certain modern writers in the attempted definition of the crime of conspiracy) can be properly applied to combinations where neither the end nor the means to be employed are, *per se*, criminal, refers to the opinion of the judges, delivered in the House of Lords, as late as 1868, in which the theory that the word "unlawful," as applied to criminal conspiracies, would include

mere civil wrongs, was in effect repudiated, the opinion in part stating:

"A conspiracy consists not merely in the intention of two or more to do an unlawful act, or to do a lawful act by unlawful means. * * * When two agree * * * if for a *criminal* object, or for the use of *criminal* means," etc.

The author, commenting on this language, observes:

"An example, which, in its use of both 'unlawful' and 'criminal,' shows that the antithesis has not in the most modern times and in the highest courts been understood to involve the doctrine for which the antithesis has been sometimes cited."

The author concludes (page 51):

"An expression (unlawful) can not be the definition of conspiracy, the defining part of which is itself so devoid of definiteness for the purposes for which a definition is required."

In Roscoe's Criminal Evidence, volume 1 (8th Ed.), page 565, the text reads:

"The word 'unlawful,' in the definition of conspiracy, has no precise meaning, and the definition is in reality no definition at all."

In State vs. Van Pelt, 136 N. C., 633, 646, the Supreme Court of the state, through Connor, J., said:

"The word (unlawful) is of such varied and uncertain import that it is unfortunate that it was ever used to define a criminal act."

Endlich on Int. of Stats., section 119, discourses on the meaning of the word "unlawful," when used in a criminal statute, as follows:

"In the 24 and 25 Vict., chapter 96, which consolidates the law relating to larceny and analogous offenses, the provision which imposes a penalty for 'unlawfully and wilfully' killing a pigeon under circumstances not amounting to larceny, was construed as not applying to a man who had intentionally and without legal justification shot his neighbor's pigeons which were in the habit of feeding upon his land; his object being to prevent a recurrence of the trespass. His act was 'unlawful,' in the sense that it was actionable; and it was undoubtedly 'wilful' also; but as the object and scope of the act were to punish crimes and not mere civil injuries, the word 'unlawfully' was construed as 'against the criminal law.'"

In Greenleaf on Evidence (15th Edition), volume 3, section 90a, the subject in hand is thus discussed :

"Without attempting to reconcile all the cases, a task nearly hopeless in the present undefined state of the law of conspiracy, a general rule may be deduced from the current of well-considered cases, that an indictable conspiracy must be a corrupt confederation to promote an evil in some degree *criminal*, or to effect some wrongful end by means having some degree of criminality. Although, in some cases, it has been said, that, if the end is *unlawful*, concerted action to promote it is indictable, yet the word 'unlawful' is to be taken in the sense of *criminal*, as it is unlawful to commit a trespass; still no indictment will lie for a conspiracy to commit such a civil injury."

In Johnson vs. State, 66 O. St., 59, 66, 67, 69-70, the court considered the meaning of the word "unlawful," appearing in section 6811, Rev. Stats. of Ohio, such section reading:

"Whoever *unlawfully* kills another * * * is guilty of manslaughter, and shall be imprisoned," etc.

The court, *inter alia*, saying:

"It must be borne in mind that we have no common law offenses in this state. No act or omission, however, hurtful or immoral in its tendencies, is punishable as a crime in Ohio unless such act or omission is *specially enjoined* or *prohibited* by the *statute law* of the state. It is therefore idle to speculate upon the injurious consequences of permitting such conduct to go unpunished, or to regret that our Criminal Code has not the expansiveness of the common law." * * *

"We think the same rule abides in many, if not all, of the other states of the Union whose legislatures have made codes or systems of statutory crimes. It evidently is true of the *federal government*, as settled by repeated decisions of the *Supreme Court of the United States.*"

The court then applied the principles so announced, to the case in hand, in part, saying on page 67:

"* * * the act committed when the unintentional killing occurs must be a violation of some *prohibitory* law. The very word 'unlawful,' in criminal jurisprudence, means that and nothing less." * * *

Pages 69-70:

"Another observation is appropriate here. The uncertainty of the common law. Some principles which are deemed common law in Ohio are not so regarded in other states, and what some

of them regard as common law we do not recognize as such in Ohio. * * * Many acts or omissions to act which before were subject to the charge of negligence are made penal by statute. And a consideration of this course of legislation demonstrates that there is no longer a necessity to turn to the common law to find what act or acts it is *unlawful* to commit."

The court thereupon held that the defendant was not guilty of manslaughter under the statutory definition of that crime, as expressed in said section 6811, and ordered his discharge.

An examination of the facts there involved will disclose that under common-law principles the defendant was clearly guilty of manslaughter.

In Potter vs. State, 162 Ind., 213, the court considered and applied the provisions of section 1908, Horner's Rev. Stats., of Indiana, where the word "unlawful" appeared in the definition of the crime of manslaughter and in holding that the quoted term must be limited to acts *malum in se*, *inter alia*, said:

"It is *malum prohibitum*, not *malum in se*, for an unauthorized person to kill game in England contrary to the statutes; if, in unlawfully shooting at game, he accidently kills a man, it is no more criminal in him than if he were authorized."

In Comm. vs. Adams, 114 Mass., 323, 324, it was held that one who negligently drives over another is not guilty of assault and battery, although he does it while violating a city ordinance against fast driving. The court here drew a sharp distinction between acts *malum in se* and *malum prohibitum*, as applicable to *unlawful* conduct, saying:

"The act, to be *unlawful* in this sense (criminal), must be an act *bad in itself*, and done with an evil intent; and the law has always made this distinction: that if the act the party was doing was merely *malum prohibitum*, he shall not be punishable * * * but if *malum in se* it is otherwise." (Citing 1 Hale, P. C., 39; Foster, C. L., 259.)

The distinction is here clearly pointed out between civil and criminal liability growing out of injuries resulting from a violation of a statute or municipal ordinance. If the thing prohibited be not *malum in se*, then criminal liability does not follow, while, from the standpoint of a civil remedy, the violation of a statute or ordinance constitutes, *per se*, conclusive evidence of actionable negligence.

See collection of cases on this point in volume 21, A. & E. Ency. of Law (2d Ed.), page 478.

In Estell vs. State, 51 N. J. L., 182, 185, the Supreme Court of New Jersey considered the question of the criminal liability of the defendant upon a charge of manslaughter where the homicide was the outgrowth of an effort on his part to unlawfully evade the payment of toll.

In the course of the opinion the court applied the law to the facts in the following language:

"The act of the defendant, in making this attempt (to evade payment of toll) * * * was, at its worst, merely *malum prohibitum*. * * * The mere unlawfulness of the act does not, in this class of cases, *per se*, render the doer of it liable, in criminal law. * * * The doctrine is stated in the text books, and is exemplified in a long train of decisions."

In the dissenting opinion of Mr. Justice Brewer, in Pettibone vs. U. S., 148 U. S., 197, 210, the learned judge, in discussing the significance of the term "unlawful" as an ingredient of the crime of conspiracy, remarked:

"Where parties combine in an unlawful undertaking—and by that I mean an undertaking *unlawful in and of itself, and not one simply forbidden by statute;* one which is *malum in se* as distinguished from *malum prohibitum*—they are amenable to the bar of criminal justice."

And nothing that was said in the opinion of the court contravenes in the slightest degree the limitation thus placed upon the import of the word "unlawful."

In the 9th edition of the Encyclopedia Britannica, volume 6, page 294, where the subject of criminal conspiracy from the standpoint of English law is discussed, it is said: that the meaning of the words "lawful" and "unlawful," when employed in the definition of conspiracy, have "nowhere been precisely stated," adding that acts may be unlawful in a certain sense, and yet fall without the pale of criminal cognizance.

We have devoted so much space to the consideration of the word "unlawful" (though such word does not appear in section 5440), because of the fact that this court in the Pettibone case, *supra*, by referring to the modern judicial definition of common law conspiracy, has thereby inferentially, at least, lent some degree of countenance to the idea that the term "defraud," as

used in section 5440, may be expounded in the sense of "unlawful," as employed by the courts in the attempt to define conspiracy at common law.

We may have attached undue importance to the language used by the court, in the Pettibone case, and we trust such may prove to be the fact. Etymologically, the words "defraud" and "unlawful" are not expressive of identical ideas. While all acts of defrauding may be said to involve "unlawful" conduct, the converse of the proposition does not follow; many acts may be properly denominated as unlawful and yet lack the essential ingredients of fraudulent conduct.

In any event, this much is clear; the authorities above cited disclose, beyond peradventure, that the word "unlawful" is a term of the most uncertain import when applied as a characterization of a criminal conspiracy. The safe and humane course is to rigidly limit its application to conduct involving *moral turpitude, acts malum in se*, and thereby to exclude mere violation of implied statutory policy, where, save for such implication, the particular transaction would be entirely innocent and legitimate. The contracts here assailed, viewed from the standpoint most unfavorable to the defendants, fall strictly within such excluded category.

XII.

Precedents sustaining prosecutions for conspiracy to "defraud" under section 5440 are limited to combinations involving "moral turpitude" or acts malum in se, and this case presents neither of these elements.

We are now brought face to face with one of the fundamental objections to the indictment at bar, and we ask the court to give special thought to the discussion about to follow, and the authorities to be presently brought to its attention.

We will concede, *arguendo*, that the contracts forming the basis of the pending prosecutions may be *impliedly* prohibited by the provisions of the coal land act, and that a *civil suit* in equity, on the theory of a *constructive* fraud, can be maintained by the government to vacate any patents which might be issued under entries made pursuant thereto. In making this concession the fullest force and effect is given to every word employed

in the opinion of this court in the Trinidad case, 137 U. S., 160, to which opinion we will presently direct our special attention.

But all this falls far short of making out a case for the government under section 5440, as we will now undertake to show.

The most that can be urged against the validity of the contracts in question is, that they may be *malum prohibitum*. There is nothing inherently immoral in such transactions. Neither are they *malum in se*, nor obnoxious to any doctrine whatsoever of the common law.

The word "defraud" is associated, in section 5440, with the term *"offense,"* the crime of conspiracy, there made penal, being "to conspire either to commit an '*offense* against' * * * or 'to defraud' the United States in any manner," etc. The term "offense" is synonymous with crime, and so regarded by all standard glossaries, and by force of such association, *the word "defraud" takes color from the term "offense,"* thereby importing that the nature of the act of defrauding, to constitute a crime under the section, must savor, at least, of the evil intent and purpose usually present in the commission of a criminal act.

This court made an instructive application of the rule of construction under discussion in Neal vs. Clark, 95 U. S., 704-708-9. The material portion of the statute there considered, reads:

"No debt created by the *fraud* or *embezzlement* of the bankrupt * * * shall be dischargable," etc. (Bankruptcy Proceedings.)

The court, in holding that nothing less than conduct involving "moral turpitude" would constitute "fraud" under the act, said:

"It is a familiar rule in the interpretation of written instruments and statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.' So, also, 'the meaning of a word may be ascertained by reference to the meaning of words associated with it.' In Broom's Legal Maxims, page 450, it is said: 'It is a rule laid down by Lord Bacon, that, *copulatio verborum indicat acceptationem in eodem sensu*, the coupling of words to gether shows that they are to be understood in the same sense. * * *

"Applying these rules to this case, we remark that, in the section of the law of 1867, which set forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section *means positive fraud*, or fraud in fact, *involving moral turpitude*."

The same thought is expressed in Hagerman vs Buchanan, 45 N. J. E., 292, where the Court of Appeals and Errors of New Jersey remarked (pages 299-300):

"There is force in the remark of Mr. Bigelow that the term 'legal fraud' is a misnomer. The word 'fraud' implies *moral turpitude*. When a transaction is voided by the statute * * * upon consideration of *policy* only, it is *unlawful and not fraudulent*."

From these authorities, it seems to us clear, beyond cavil, that the word "defraud" being associated with and immediately following the word "offense," in section 5440, no conduct, or the entering into of any contract, can amount to a fraud or an act of defrauding within the proper concept of such section, unless "*moral turpitude*" be involved in the transaction, and the query therefore presents itself: Does the making of contract which merely violates an *implied prohibition* contained in a statute, but which, in and of itself, would not, *per se*, be in derogation of any principle of the common law *(independent of the statutory prohibition)*, involve the commission of "*moral turpitude?*"

We answer, unhesitatingly, no, and say that this court has so explicitly held.

In Spring Co. vs. Knowlton 103 U. S., 49, the defendant corporation *illegally* increased its capital stock, the *statute* governing the subject having *expressly prohibited* an increase in the mode resorted to by the defendant. A subscriber to the stock, who had been an active party to such *illegal* scheme, having paid the corporation certain money on his subscription, sued to recover it back on the ground that he had a right to rescind, because the contract of subscription was *contrary to public policy*, and the court held he could maintain the action because the *illegal contract* of subscription *was only partly performed*.

In the course of the opinion the court remarked (pages 57-58):

"It is to be observed that the making of the *illegal* contract was *malum prohibitum* and not *malum in se*. There is *no moral turpitude in such a contract*, nor *is it* of *itself fraudulent*, however much it may afford facilities for fraud."

If the principles so stated be sound legal propositions in a *civil* action *at law, a fortiori*, such character of contract *can not be held fraudulent in a criminal prosecution, neither can it be regarded as involving moral turpitude.*

The phrase "moral turpitude" is one which has received an exact legal definition. In Blackburn vs. Clark, 41 S. W., 430, 431, the court said:

"The words 'moral turpitude' may be defined as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the *accepted and customary* rule of right and duty between man and man." (Citing Newell, Defam., page 99; Lemons vs. Wells, 78 Ky., 117.)

For other cases in line with the foregoing, see:

Baxter vs. Mohr, 76 N. Y. S., 982.
In re Disbarment of Coffey, 123 Cal., 522.

Congress, in recent legislation, has expressly recognized that given conduct may be *illegal*—nay, more—may be technically *criminal*—and yet not involve *moral turpitude.*

The 2d section of the act of February 20, 1907 (34 Stat., 898), in defining classes of aliens who shall be denied admission into the United States, enumerates "persons who have been convicted of or admit having committed a felony or other crime or *misdemeanor* involving *moral turpitude.*"

The final clause of the sentence thus quoted is meaningless unless it be treated as a legislative declaration that a person may commit a "misdemeanor," by conduct violative of even an express penal statute, and yet be guiltless of "moral turpitude."

"*Malum in se* (moral turpitude) is properly defined as one which is naturally evil, as adjudged by the sense of a civilized community, whereas an act *malum prohibitum* is wrong only because made so by statute."

State vs. Horton, 139 N. C., 588, 592.

The above language was used in discussing the proposition that the principles of the criminal law do recognize a broad distinction between acts *malum in se* and *malum prohibitum*.

A valuable discussion and application of the distinction, in criminal law, between acts merely *malum prohibitum* and those *malum in se*, or involving "moral turpitude," will be found in the opinion of the Court of Appeals of New York, in People vs. Phyfe, 136 N. Y., 554-559, the court saying:

"We are required here to apply that principle of construction, which is coeval with municipal law, that *purely statutory offenses* can not be established by implication, and that acts otherwise innocent and lawful *do not become crimes*, unless there is a *clear* and *positive* expression of the legislative intent to make them *criminal*. The citizen is entitled to an unequivocal warning before conduct on his part, which is not *malum in se*, can be made the occasion of a deprivation of his liberty or property."

In this connection we desire to call attention to U. S. vs. Britton, 108 U. S., 199, for an instructive application of the doctrine that a prosecution under section 5440 can not be aided by alleging a combination to commit acts merely *mala prohibita*.

As a cognate principle to the one now under special consideration, we also rely upon the proposition that *where a statute merely prohibits the doing of an act, but provides no penalty as a result of its violation, the only legal liability which can follow from such infraction is a recovery in a civil suit by the injured party.*

In Chapman vs. County of Douglas, 107 U. S., 348, 356, the elementary rule above referred to is thus expressed:

"When *no penalty* is imposed, and the intention of the legislature appears to be simply that the agreement is not to be enforced, then neither the agreement itself nor the performance of it is to be treated as *unlawful for any other purpose*." (Citing Pollock on Contracts, 264; Johnson vs. Meeker, 1 Wis., 436.)

The same principle was expressed in Pratt vs. Short, 79 N. Y., 437, 445, where it was said:

"A *prohibitory statute* may itself point out the consequences of its violation, and if, on a consideration of the whole statute, it appears that the legislature intended to define such consequences and to exclude any other penalty or forfeiture than

such as is declared in the statute itself, *no other will be enforced.*"

The conclusion, according to the rule as stated by this court, must be that congress, *having failed to provide any penalties*, the courts are not authorized to treat such contracts as illegal (if at all) for any other purpose than for their *annulment* in appropriate chancery proceedings. Accordingly, there is no warrant of legal authority to employ the implied prohibitions (if any) contained in the coal land act, as the basis for or in aid of a *criminal prosecution*, for "fraud" upon the United States, or for the entering into of a conspiracy for the purpose of "defrauding" it, by means of contracts of the character under consideration.

Speaking in round numbers, there were about a hundred reported cases involving prosecutions for conspiracy under section 5440 prior to the finding of the indictment herein. The writer of this brief has taken the pains to examine each and every of the printed opinions therein, wherein the indictments have been upheld. The essential features of the transactions involved in those prosecutions may be grouped under the following heads:

First. Conspiracy to commit some specific, collateral crime, defined and made punishable by some act of congress.

Second. Conspiracy to defraud the United States in the matter of fraudulent entries of public lands, under either the homestead, pre-emption, timber culture or timber and stone entry act, *in each and every of which instances the conspiracy contemplated the commission of perjury by the entryman, in direct violation of the express terms of the act of congress under which the entries respectively were to be made.*

Third. Conspiracies to practice a fraud upon the government in connection with the administration of public laws, relating to civil service examination and the like * * * and the contemplated acts in each instance involved the commission of conduct palpably *malum in se.*

Fourth. *Conspiracies to practice frauds upon the government by obtaining payment of public moneys on either false or forged documents, vouchers, warrants, certificates or other writ-*

ten instruments where genuine papers were specifically required by the act of congress in the premises.

Fifth. Lastly, a class *sui generis* exclusively, represented by the facts involved in Hyde vs. Shine, 199 U. S., 62, 78-79. The conspiracy charge in that case was stated by this court as follows:

"The conspiracy charged, embraced certain false practices by the defendants whereby school lands were to be obtained fraudulently from the states of California and Oregon by Hyde and Benson, (1) in the names of fictitious persons, and (2) in the names of persons not qualified to purchase the same, whereby the said Hyde and Benson were to cause and require such school lands to be relinquished *by means of false and forged relinquishments, assignments and conveyances to the United States, in exchange for public lands*, to be selected, and for titles thereto by patents to be obtained by and on behalf of the said Hyde and Benson. A further element of the conspiracy is that defendants were, by *bribery*, to induce certain United States officials in the general land office at Washington, in the District of Columbia, corruptly, and contrary to their official duties, to aid defendants to secure the approval of their fraudulent selections in advance of their regular order, and to inform defendants of any discovery of investigation by the government of their said fraudulent practices."

It may not be amiss to here observe that, though the facts in Hyde vs. Shine involved "moral turpitude" of the grossest character, the case itself is not an authoritative precedent.

It arose on writ of *habeas corpus* to test the validity of a removal order under section 1014, U. S. R. S.; in effect, an indirect, collateral attack upon the sufficiency of the indictment, and *under an express holding of this court, any opinion given by it under such circumstances would not bind even an inferior federal tribunal.*

Green vs. Henkel, 183 U. S., 249.
Ex Parte Parks, 93 U. S., 18.

In principle, and upon precedent, therefore, it may be justly asserted that the scope of section 5440 should, at the *very utmost, be properly limited* to conditions wherein either *the end* to be attained is, *or the means designed* to be employed to accomplish the same are, intrinsically *malum in se*, and *not merely*

malum prohibitum, and neither of such essential elements are present in the case at bar.

XIII.

The exposition of the coal land act, contained in the opinion of this court in the equity suit of the United States vs. The Trinidad Coal and Coking Co., 137 U. S., 160, is neither authoritative nor applicable in the pending prosecution.

The effort will doubtless be made here, by counsel for the government, as was true in the court below, to utilize the remarks of this court expressed in its opinion in the case last mentioned. In view of such contingency, we will now offer reasons and cite authorities to support our contention that nothing that was there said should have any weight or consideration in the present instance.

The Trinidad case was *a suit in equity*, seeking the cancellation of patents acquired for coal lands under *special* circumstances which this court regarded as an evasion of the "policy" of the coal land laws and a fraud upon its spirit, the court evidently using the term "fraud" in the sense in which courts of chancery frequently characterize transactions as *constructive* frauds for purposes of convenient terminology.

At *this* juncture we will not essay the task of questioning the soundness of the views there expressed when limited to civil litigation on the equity side of the court, though we will venture the remark that in the light of subsequent decisions of this court its reasoning and conclusions in the Trinidad case have been, in effect, overruled, *sub silentio*, even for purposes of purely equitable relief.

We refer to U. S. vs. Budd, 144 U. S., 154; Hafemann vs. Gross, 199 U. S., 342; Adams vs. Church, 193 U. S., 510; Hartman vs. Butterfield Lumber Co., 199 U. S., 335.

Nor will we tarry to dwell upon the fact that Mr. Justice Brewer, in U. S. Trinidad, etc., Co., 37 Fed., 180, expressly held that contracts far more objectionable from a moral standpoint than those assailed in the pending indictment, were wholly unobjectionable from the view point of equity jurisprudence. Neither will we dilate upon the effect of a similar holding by the Supreme Court of Colorado in Lipscomb vs. Nicholls, 6 Colo., 290, but will restrict our remarks to an application of

what we conceive to be fundamental axiomatic legal truths, namely:

That what a court of equity may see proper to designate as a "fraud" upon the "policy" of the coal land act affords no criterion for the correct interpretation of the term "defraud," appearing in section 5440, when such section, and the provisions of the coal land statute, jointly, form the basis of a criminal prosecution for conspiracy.

XIV.

Civil and criminal law are wholly independent branches of jurisprudence.

Thus, in Andrews American Law, section 688, the author says:

"The law of crimes and criminal procedure has no close relation, logically speaking, to the other branches of the law. It is a distinct part of the *corpus juris*."

And we again cite Bishop's New Criminal Law, volume 2, section 818, where the author states:

"Fraud, as a *civil wrong*, is not identical with fraud in *criminal law*."

The civil doctrine of trespass, *ab initio*, has no foothold in criminal law. See Com. vs. Tobin, 108 Mass., 426, 429-430; State vs. Moore, 12 N. H., 42, 47-48; Milton vs. State, 40 Fla., 251, 264.

Many other illustrations in point will readily suggest themselves to the court.

That it is not the province of courts of equity to define crimes or in any manner take cognizance thereof is hornbook law.

Thus, Kerr on Fraud and Mistake, page 43, observes:

"Courts of equity do not affect to consider fraud in the light of a *crime;* it is not their province to punish; nor have any censorial authority; they interfere in cases of fraud in a civil and not in a criminal point of view."

It is also a trite principle that a statute or given word therein may receive one interpretation for purposes of a *civil* remedy, but properly be given a different acceptation for penal purposes.

Under the doctrine just stated the provisions of the coal land act, when relied on by the government in aid of a civil suit in equity, may be subject to a *liberal* construction in behalf of the United States, but when used as the basis of a *criminal* prosecution, such legislation must be *strictly* construed against it and liberally in favor of the defendant.

In Smith vs. Townsend, 148 U. S., 490, 497, Mr. Justice Brewer, speaking for this court, announced a cardinal rule of statutory construction in quoting from 1st Blackstone's Commentaries, 88, where the learned commentator declared:

"Statutes *against* frauds are to be liberally and beneficially expounded. This may seem a contradicton to the last rule, most statutes against frauds being in their consequences penal, but this difference is here to be taken, when the statute acts upon the *offender* and inflicts a *penalty*, as the pillory or a *fine*, it is then to be taken *strictly*, but when the statute acts upon the *offense by setting aside the fraudulent transaction, here it is to be construed liberally.*"

The same doctrine is announced in the text of Lewis' Sutherland on Stat. Const., vol. 2 (2d Ed.), sections 337-683, and Porter's Dwarris on Stats. and Const., page 260.

In Sedgwick on Const. and Stat. Law, page 335, the text reads:

"It has been said that the same *expressions* may be *differently* construed, according to their appearing in *a civil* or *a criminal* action." (Citing 1st Binney, 601.)

In section 517, Lewis' Sutherland Stat. Const., volume 2 (2d Ed.), the text reads:

"The *same* language may have a broader scope and effect for *remedial* purposes than under the restraining influence of considerations which induce *strict* construction. In the case of Bones vs. Booth, 2 W. Black, 1226, construction was given to the phrase 'a single sitting' of a loser at play. The statute gave him a right for a limited time to recover his losses above 10£ at 'a single sitting;' and gave an informer, afterwards, the right to recover them and treble value besides. As to the loser, the statute was held remedial, and the losses those of a single sitting, though suspended for dinner, but as to the informer's right, the statute was penal, and the suspension for dinner broke the continuity of the sitting."

Chief Justice Best, in Short vs. Hubbard, 2 Bing, 349, 355; 9 E. C. L., 610, observed:

"There is no impropriety in putting a *literal* construction on a penal clause, and a *liberal* construction on a remedial clause in the same act of parliament."

And Bishop on Statutory Crimes, section 199, remarks:

"In construing statutes to *prevent* frauds * * * there is a pressure toward a liberal interpretation; but if they also provide a *penalty*, being a thing odious to the law, there is another pressure toward the *strict rule*."

The Supreme Court of Appeals of West Virginia, in State vs. Ross, 62 W. Va., page 106, said:

"The courts have adopted the sensible proposition that in so far as the statute is remedial it is to be liberally construed, but strictly construed in so far as it is penal."

Correlative to the principle of statutory construction under consideration, is the familiar rule that the words "fraud" and "defraud," *in equity*, may receive an entirely different meaning from the sense in which the same terms are understood, even in a civil action *at law*, and *a fortiori*, a radically distinct acceptation when like terms are employed in a penal statute.

In Broome vs. Beers, 6 Conn., 198, 210-11, in discussing the subject in hand, it was said:

"It is the common exercise of chancery jurisdiction to give relief in cases of fraud; and that is sometimes *called a fraud in equity*, which is not such strictly, but *figuratively*. * * * Imposition, oppression, undue advantage and *neglect*, are often comprehended under the *general term frauds*, and are susceptible of relief, *as such*, in a court of *equity*. * * * That there may be a fraud in the view of a court of equity, *which is not so at law*, has long since been declared. Trenchard et al. vs. Manley, 2 P. Wms., 166. And of this *legal truth*, the determination in chancery gives the most abundant confirmation."

In Kilbourn vs. Sunderland, 130 U. S., 505, 515, this court recognized the distinction in hand, saying:

"Fraud has, *in equity*, a more extensive signification than at law."

In Pomeroy's Eq. Juris. (3d Ed.), volume 2, section 922, the subject of constructive fraud is thus discussed:

"*Constructive fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or nature*, which *equity regards as wrongful*, to which it attributes the same or similar effects as those which follow from

actual fraud, and for which it gives the same or similar relief as that granted in cases of *real* fraud. *It covers different grades of wrong.* It embraces contracts *illegal*, * * * *transactions* voidable in equity because *contrary to public policy.*"

Therefore, the terms "fraud," "fraudulent," "contrary to public policy," and the like, embodied in the opinion in the Trinidad case, simply amount to a declaration that, *from the standpoint of a court of equity*, transactions of the character here under consideration are merely *constructively* fraudulent, without necessarily involving the idea that any criminal fraud, in legal contemplation, was practiced or contemplated to be practiced.

Additional authorities strengthen, if that were necessary, the principle which we are here contending for, and which is so clearly and emphatically announced by the learned author from whom we have just quoted.

In volume 16, Cyclopedia of Law and Procedure, page 84, the text, inter alia, reads:

"* * * *Equity* will *treat as fraudulent many transactions* which would *not* be so *regarded at law.*"

Again, on page 87, id., in discussing the subject of constructive frauds, the text reads:

"They (constructive frauds) extend to the entire group of *contracts invalid on the ground of public policy. Contracts contrary to the policy* of a statute are in like manner *treated as if fraudulent.*"

And in note 44 to the same page, in the further discussion of constructive frauds, it is said:

"The treatment of such cases on the *basis of fraud* in an *exclusively equitable doctrine.*"

Bigelow on Frauds, volume 2, page 9, in discussing what constitutes fraud in its true legal sense, inter alia, remarks:

"*There is solid ground for a legal distinction* between the case of a man who does an act which the *common conscience* would repudiate as a fraud and one which it would regard as *only invalid because contrary*, e. g., to *public policy.* Terms are often deceptive, and their use must be narrowly scrutinized, so that the substance of things concealed by them may be regarded. And it is the more important to set out with this *warning* in regard to fraud under *statutes*, for

the reason that it will not be practicable to keep *constructive fraud* separate from *real fraud* in the following pages."

Again, on page 10, the author says:

"The term 'fraud' itself, which has veered in meaning from the extreme of personal dishonor almost, if not all the way, around to negligence, affording ample illustration. It matters not; there will still be *a clear distinction in law, as well as in morals*, between cases in which there is *guilt*, according to the common *conscience*, and cases in which there is not. Cases of the latter kind may be declared 'fraudulent' for some purposes; *the same thing as cases of guilt they can not be*."

In volume 14, A. & E. Ency. of Law (2d Ed.), page 19, the text, in discussing the subject of fraud, reads:

"Fraud may give rise to various remedies, both at law and in *equity*, and *circumstances that amount to fraud* for the purpose of *one* remedy do not necessarily constitute fraud for the purpose of another. * * * It is *impossible*, therefore, to frame a definition of fraud that will apply to *all* cases."

In note 2, on the same page, "fraud," in the loose, undefined sense in which the term is employed by courts of *equity*, is thus expressed:

"The books furnish us with no general exclusive definition of what constitutes fraud; and where precedents fail in determining a particular case *it is, to a great extent, left to the conscience of the chancellor to decide*."

This statement of the rule well explains why this court, in the Trinidad case, in the exercise of appellate chancery jurisdiction, could well hold transactions similar to those involved in the case at bar as fraudulent, because simply violative of the policy of the law, and yet the identical transaction in a court of law, and *a fortiori*, in a criminal prosecution, would not constitute fraud in the sense in which such term is employed in the penal statute under review.

From this mass of authority it seems to us a needless task to further urge that the ruling in that case can not appropriately be utilized for any purpose as an authority in the present instance.

XV.

The judicial exposition of a statute is not LAW in future controversies.

Another thought suggests itself in this connection: When a court of equity expounds a statute (coal land act), in furtherance of remedial ends, is every citizen legally chargeable with notice that the like interpretation will be judicially adhered to in a criminal prosecution, based, in whole or part, upon the same statute? Or, otherwise stated, is the judicial interpretation of a statute given in an equity suit, to be deemed written into the statute, and, therefore, "law" for *penal* purposes, as effectively as if the statute, when enacted, embodied such judicial exposition in express terms?

We submit each of these questions should be answered in the negative. *A judicial construction of a statute is not "law" in the correct acceptation of the term.* Especially is this true where the attempt is made to engraft thereon a broad, liberal interpretation, made for civil remedial purposes, as expressive of legislative policy, as the exact sense of the same statute when sought to be utilized as the basis of a criminal prosecution.

The Supreme Court of California elaborated this proposition with great acumen and lucidity in Alferitz vs. Borgwardt, 126 Cal., 201, 208, where first quoting from Douglas vs. Pike Co., 101 U. S., 687, wherein it was said:

"After a statute has been settled by judicial construction the construction becomes, *so far as contract rights acquired under it are concerned*, as much a part of the statute as the text itself, and a change of the decision is to all intents and purposes the same in its effect on contracts as the amendment to the law by means of a legislative enactment."

Then adds:

"Beyond this the cases cited do not go. * * * *Laws are not made by judicial decisions.* The court simply determines the rights of the parties to the action in *that particular controversy.* It is *no part* of its purpose even to declare the *law.* It simply *applies to the controversy the law as it exists* when the alleged rights or *liabilities* accrued. The decision has never been thought to have the force and effect of law, *except in that special controversy.* In other suits it is authority more or less persuasive according to the reasonableness of the rule. *Courts*

have never thought themselves bound by it as they are by a valid statute."

In Baltimore, etc., Co. vs. Baugh, 149 U. S., 368, 371, Mr. Justice Brewer, speaking for this court, observed:

"In the ordinary use of language it will hardly be contended that the decisions of courts constitute *laws*. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective or ill-founded, or otherwise incorrect."

In Swift vs. Tyson, 16 Peters, 1-18-19, it was, inter alia, said:

"In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws."

Among the many adjudications to the like effect, see

Yates vs. Lansing, 9 Johns., 395, 415 (N. Y.).
U. S. Savings, etc., Co. vs. Harris, 113 Fed., 27.
Phipps vs. Harding, 70 Fed., 468.
Falconer vs. Simmons, 51 W. Va., 172.

The force and effect of section 5440 and the coal land act should be here declared, upon the same principles as though the pending prosecutions had been instituted *before* the decision in the Trinidad case was announced. The legal (penal) accountability, if any, of the defendants rests, not upon anything said by this court in that instance, but upon the admissible canons of statutory construction applicable to penal statutes, or, what amounts to the same thing, a statute sought to be applied to penal uses and purposes. To us it therefore seems an indisputable proposition that the United States can not be here aided in any degree by the remarks of this court in the Trinidad case. The guilt or innocence of the defendants in error, from a legal view point, must be arrived at under rules and principles which require the ignoring of that opinion for any and all purposes herein.

XVI.

Congress did not, in FACT, intend by the enactment of the coal land law to make its provisions an adjunct to any criminal prosecution whatsoever. This position is borne out by a comparison of the provisions of the coal land act with those of the pre-emption, homestead, timber and stone, and other public land laws.

We have heretofore discussed at length the proposition that the *letter* of the coal land act does not afford any warrant for the maintenance of this prosecution, and for that reason alone the indictment fails to charge the commission of any criminal offense known to or recognized by the statutes of the United States.

We now go one step farther, and insist that the true interpretation of that act justifies the conclusion that congress did not *in fact* intend to penalize contracts by coal entrymen, whether "preferential" or "private cash" (anterior to entry), to convey the lands to be entered, to others after purchase from the United States, even though the ultimate designed grantee or grantees might have theretofore exhausted his or their direct right of entry under the coal land act.

In support of this position we will direct the attention of the court to the federal laws relating to public *lands* (other than coal lands) for the purpose of showing that *wherever congress intended to penalize* given conduct relative to entries or purchases thereof, it has uniformly done so in *explicit terms*, leaving nothing to be inferred or imagined in that behalf, while in the case of *coal land entries* it has *studiously refrained* from even inferentially suggesting that any conceivable conduct in connection therewith would subject the person or persons committing the same to any criminal responsibility whatsoever.

The *pre-emption* law of September 4, *1841* (section 2262, Rev. Stats.), in force when the coal land statute was enacted, *expressly* required the making of an affidavit by the pre-emptor before entry, to the effect that the entry was being made for his own sole use and benefit, etc.

Then follow provisions to the effect that a *false oath* in that behalf should *operate as a forfeiture of the purchase money* paid the government, and *also all right and title to the land entered*, and that *all grants or conveyances* which he might

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make, *except in the hands of bona fide* purchasers for valuable considerations, should be *null* and *void*.

The homestead act of May 20, 1862, also required the making of an affidavit by the homestead claimant before final entry, of substantially like tenor with that so prescribed by the preemption law, coupled with the additional provision that any *false oath taken* in the premises *should subject the homesteader to the pains and penalties of perjury*.

Section 2 of the *stone and timber act* of June 3, 1878 (20 S. L., 89), requires an applicant thereunder to make affidavit to the effect that the contemplated entry is not made for speculative purposes, or directly or indirectly for the use of another, etc.

The section then provides that false swearing in the premises shall subject the purchaser to the pains and penalties of perjury, forfeits the purchase money paid to the government, and declares all grants or conveyances made in violation of the requirement of the act absolutely *null and void*, except in the hands of *innocent purchasers*.

The first section of the *timber culture act of June 14, 1878* (20 Stats. at Large, 113), provided that any citizen of the United States might obtain a patent for any quarter section of public lands, on the condition that for a period of eight years he should "plant, protect and keep in a healthy growing condition, ten acres of timber" thereon.

The second section of the act required the applicant desiring to avail himself of the benefit thereof to make the following affidavit:

"I, * * * do solemnly swear * * * that *this* filing and *entry* is made for the cultivation of timber, *and for my own exclusive use and benefit;* that I have made the said application in good faith, and *not for the purpose of speculation*, or *directly or indirectly for the use or benefit of any other person or persons whomsoever;* that I intend to *hold* and *cultivate* the land, and to fully comply with the provisions of this said act; and that *I have not heretofore made an entry* under this act, or the acts of which this is amendatory."

The section further provided that "no final certificate shall be given or patents issued for the lands applied for until the expiration of eight years from the date of such entry" (viz., date

of original application and filing of affidavit as above mentioned).

The commissioner of the general land office was empowered by section 5 to promulgate all rules and regulations consistent with the act to carry its provisions into effect.

Section 6 extended the provisions of certain criminal statutes of the United States to "all oaths, affirmations and affidavits required or authorized by this act."

The act of March 3, 1891, entitled "An act to repeal *timber-culture* laws, and for other purposes," volume 1, Supp. Rev. Stats., page 940, inter alia, repeals the pre-emption law, and by the fifth section of the act the provisions of the original homestead law, touching the *affidavit* required of a *homestead claimant* applying to enter, is amended so as to require a more stringent oath touching non-alienation than was true under the original homestead act.

By the provisions of section 24, *act May 2d, 1890, relating to the territory of Oklahoma*, 26 Stats. L., 81 (volume 1, Supp. R. S. U. S., 720-731), it is expressly declared to be unlawful for any person, corporation, etc., to directly or indirectly "procure" the settlement by another upon any lands open to settlement in the territory of Oklahoma with the intent upon the part of the procurer to thereafter acquire title thereto, adding:

"And any title thus acquired shall be *void*."

The section further provides "the parties to such *fraudulent* settlement" should be severally deemed *guilty of a misdemeanor*, punishable by a prescribed fine or imprisonment, or both, in the discretion of the court.

Under the *act of June 23, 1860* (section 2441, R. S. U. S.), *relating to bounty land warrants*, and authorizing the issuance of new warrants in lieu of lost original warrants, it was provided that when such new warrant was issued, the original, which it was designed to replace, should become "null and void," and the assignment of such original warrant thereafter was expressly declared to be "*fraudulent*."

And section 2442, id., inter alia, provided:

"All laws and parts of laws for the punishment of *frauds* against the United States are made applicable to *frauds under that section*." (Sec. 2441, supra.)

Section 2373, U. S. R. S., makes penal, by fine or imprisonment, or both, *combinations designed to chill or stifle biddings at public sales* of government lands.

Section 2374, id., declares that agreements entered into before the exposing of lands at *public sale*, whereby the successful bidder is to receive a sum in excess of his bid, in consideration of conveying the land purchased to the other contracting party, "shall be utterly null and void."

In view of the legislation above cited, why did congress abstain from prohibiting, in direct terms, the making of contracts such as are set out in the indictments at bar, and why has it refrained from requiring any affidavit from the entryman of coal lands that a contract of such character has not been made by him, if the contention of the government is correct, that it as much a criminal fraud upon the United States for a coal entryman to become a party to such contract as would be true of either a pre-emption—a homestead—a timber and stone—or a timber-culture entryman making a like character of contract, with reference to the land he was entering?

The necessary logic of the government's position is that for the purposes of a prosecution for conspiracy to "*defraud*" under section 5440 all of the explicit prohibitions contained in and affidavits required by the pre-emption, homestead, timber and stone or timber-culture acts, respectively, are mere surplusage; *that such statutes would be as effective without as with them, so far as a criminal conspiracy to defraud is concerned.*

The absurdity of such contention is made manifest when it is recalled that if every *express* prohibition contained in, and every affidavit explicitly required by, the last named statutes, respectively, were eliminated therefrom, the remaining portions of each of said statutes contain language which would amount to an *implied* prohibition against such contracts, as is true of any expressions to be found in the coal land act.

It follows, as a sequence, that the theory of the government's counsel is that a federal court can lawfully create a crime by construction, where congress has omitted to even remotely *suggest* such result in direct terms.

That the federal courts have no constitutional power to do this, is hereinbefore sufficiently discussed, the authorities in that behalf being:

U. S. vs. Hudson, 7 Cranch, 32.
Todd vs. U. S., 158 U. S., 278, 282.
Field vs. U. S., 137 Fed., 6-8.
People vs. Phyfe, 136 N. Y., 554-559.
Ex Parte McNulty, 77 Cal., 164.
Jones vs. U. S., 137 U. S., 202, 211.
U. S. vs. Wiltberger, 5 Wheat., 76, 95.

Courts of equity may enlarge the scope of a statute by construction for purposes of affording an appropriate civil remedy, and for convenient terminology may characterize given conduct as fraudulent, which in its final and correct analysis amounts only to illegal acts, solely because *implicdly* prohibited, as was done in the Trinidad case, but when such process of virtual judicial legislation is sought to be applied, to the end that a citizen may be deprived of his personal liberty or subjected to any form of criminal accountability, then a power higher than any or all courts forbids it, and that power is the fundamental law of the nation—the Constitution of the United States.

We say, therefore, *congress never intended to punish criminally the making of contracts like those set out in the indictments, for the all-sufficient reason that it has never said so.*

XVII.

Economic reasons in support of contention that congress did not intend to characterize contracts in question as illegal, much less criminally fraudulent.

Prior to 1864 there existed no specific legislation for the sale of coal lands as such, and whether developed, or undeveloped, they were classified by the land department as non-mineral, and treated as subject to sale under the pre-emption, public sale, or private entry law, at $1.25 per acre, and this policy remained unbroken down to 1872.

See U. S. vs. Mullan, 10 Fed., 785, 788, *ib. sub. nom.;* Mullan vs. U. S., 118 U. S., 271-5-8.

By the act of February 18, 1873, 17 St. L., 465, the public domain, containing coal or any other valuable mineral deposits, was declared subject to entry in the states of Michigan, Wisconsin and Minnesota under laws providing for the sale of non-mineral lands, and like provisions were extended to the states of Missouri and Kansas by the act of May 5, 1876, 19 St. L., 52, and to the state of Alabama by act of May 3, 1883, 22 St. L., 487, leaving the operation of the coal land law of 1873 in practical effect only in the states and territories bordering on or traversed by the Rocky Mountain system.

In arriving at the true intent of congress, with reference to the lawfulness or unlawfulness of a contract (antecedent to entry), by a qualified entryman, to convey a tract of coal land to another after entry, the peculiar nature of and hazards incident to the business of coal mining, especially in the sparsely settled states west of the Missouri river, should be borne in mind.

In 1873, when the coal land act became a law, few, if any, of the present operated coal mines in those states were then in existence, and the lands upon which they are situate were, in the main, at that time so remote from market and transportation facilities as to render them practically valueless, and to this day, in those regions, coal property, to be operated at a living profit, must have its tipples in immediate proximity to railway cars into which the product of the mine may be dumped for transportation.

In the major instances, in the states and territories under consideration, productive coal mines are found only in mountainous or semi-mountainous regions, access to which by railroads is both difficult and expensive.

The statutory price for 160 acres of coal land, situate distant, but not exceeding, fifteen miles from a completed line of railroad, viz., $3,200, operates as a practical prohibition against the citizen of *limited* means from ever acquiring such quantity, without financial aid from others, and for special reasons, hereinafter mentioned, such aid can seldom, if ever, be secured, unless title to comparatively large quantities of additional coal lands in the same locality can be secured by the

person or corporation who may be willing to finance the enterprise.

Substantially all the operated coal mines in the western states are situate at points distant from the main lines of constructed railways—frequently several miles—and the construction of branch or spur lines, connecting the main line with the coal properties, involved extensive outlays of capital on account of the topography of the country to be traversed.

The like conditions will confront future opening up of coal properties as yet undeveloped.

In view of the heavy expense incident to the building of these branch or spur lines none have been constructed in the past, nor are they likely to be in the future, unless the quantity of coal lands upon which mines may be situate is such as to afford sufficient coal traffic for comparatively long periods of time.

It requires, at the very least, some thousands of acres of apparently valuable coal lands, lying in a substantially compact body, under private control and ownership, before the required railway facilities can be secured. This is true, because the business of coal mining is subject to many well-known contingencies; the value of a tract, say of 160 acres, for that purpose, in advance of exhaustive and costly underground development, is largely speculative, as divers geological problems must always be taken into account.

Faults, dykes and divers forms of igneous intrusion may exist in any coal property, either breaking the continuity of the coal seam or seams, or by metamorphic action, lessen or totally destroy the commercial value of the coal deposits therein. Seldom, if ever, do the surface indications furnish any data from which the hidden underground conditions can be safely assumed.

Practical experience and the teaching of geological scientists inform us that the thickness, as well as the quality, of coal veins, seams or deposits, suddenly and unexpectedly change, to such an extent as to frequently compel on economic grounds an abandonment of further mining in a particular locality.

These, and other prudential reasons, practically forbid the opening up of coal mines except upon assumed coal bearing areas, running into the thousands of acres in extent, and not

until extensive prospecting has occurred such as drill boring and the like to ascertain the probable thickness, continuity and value of the coal seams therein. All this means an expenditure running into many thousands of dollars in amount.

Moreover, the business of coal mining, even on a comparatively small scale and under the most favorable conditions, involves a considerable outlay of initial capital—there is more or less dead or unproductive territory to be penetrated by tunnels, shafts or the like—extensive timbering must keep pace with the underground working, necessary machinery must be supplied and requisite labor employed—state legislation as to safety devices and precautions for prevention of explosion and other sources of danger to life and limb of employes must be complied with.

In short, well-informed persons know that coal mining can not be conducted, save at a loss, especially in the face of active competition, except by individuals or associations commanding large capital and experienced managers. To the average man of moderate means—the ordinary citizen—the privilege offered by the coal land act to purchase coal property is a mere mockery and delusion if he is denied the right, in advance of entry, to make contracts concerning the disposition of the property after final purchase from the government.

It is safe to say that seventy-five per cent., if not more, of the persons accorded the right by the statute to buy coal lands can not avail themselves of the privilege, because of want of means to pay the required price, or, if they possess the means to buy would not do so, unless they knew in advance of entry to whom they could sell after purchasing.

Any construction of the coal land act which denies the validity of the contracts involved in this prosecution, in effect, discriminates against the citizen of limited means and in favor of the wealthy, because none but the latter can ever afford to purchase and hold coal property, or operate a coal mine whether large or small.

We submit that the known conditions attending the business of coal mining must have been cognizant to congress when it enacted the coal land act, and that the intent of such law was that each citizen was thereby given the right to purchase 160 acres of coal land and no more, but it was not designed to re-

strict him in any degree as to how he should procure the purchase price, or the disposition he might see fit to make of the land after entry, or contracts which he might see proper to make in that behalf before purchasing from the government.

In no other way can the real beneficiaries of the act be enabled to enjoy its proffered privileges, and due reflection will reveal the fact that the coal industry of the country can not be adequately developed under any other construction of the law than that here contended for.

The coal land legislation was not aimed at monopoly (so-called) of ultimate *ownership*, but against one person, or a limited number of persons, being empowered to *purchase directly* an unlimited quantity of coal lands from the government.

Without the restriction as to quantity prescribed by that legislation, it would be competent for a wealthy individual or corporation, by *one* purchase in his or its *own* name, to acquire title to all public coal lands in a given state or district, thus precluding, by one transaction, all other persons from ever securing any of the benefits of the coal land enactment in that territory.

Congress designed to prevent such character of *direct wholesale purchase* of coal lands, but beyond the limitation expressly prescribed, it did not go, and public interests, as well as the peculiar nature of coal mining afford unanswerable reasons why it never intended to proscribe the contracts in suit, much less penalize them.

We will now concisely review the expressed policy of congress in providing for the disposition of public lands other than coal, as an additional argument in proof of the reasonableness of the construction of the coal land act here contended for.

Agricultural lands.

The pre-emption law of September 4, 1841, and the homestead act of May 20, 1862, granted to each adult citizen or person who had duly declared his intention to become such, the right to acquire title to 160 acres of agricultural land by paying the nominal price of $200.00 under the first act and by five years residence, cultivation and improvement, under the latter.

Under each statute the law contemplated the building up of permanent homes by the entrymen upon the public domain,

and it was assumed that the frugal, industrious citizen, whose principal capital might be only his brawn and energy, could maintain and support himself and family by the fruits or produce of the land, resulting from its cultivation and betterment, and the administration of these laws, in the main, admirably fulfilled the purposes for which they were designed.

Mineral lands.

In the disposition of its *mineral* lands, the government proceeded upon a radically different idea than that involved in the alienation of its agricultural domain.

All lode mining claims, chiefly valuable for metalliferous minerals, such as gold, silver, cinnabar, lead, tin, copper and iron, may be entered by one person under the general mining act of May 10, 1872, and its amendments, without limit, at the nominal price of $5.00 per acre, the only restriction as to location and purchase being that each mining claim must be located not to exceed 1,500 feet each along the vein, and in width not to exceed 300 feet on each side of the middle thereof.

The provisions of the statute and local law on the subject of the discovery of mineral on each claim, together with the defining of boundaries and recording of location certificates, and amount of annual assessment work being complied with, each qualified locator is allowed to locate as many claims as his means will admit of, whether contiguous or non-contiguous, or he may lawfully contract to purchase all the unpatented or unentered mining claims in a mining district or state in contemplation of acquisition of legal title by the original locators thereafter.

Under the placer claim provisions of the mineral land law, any qualified person may locate and enter, without limit as to quantity, lands containing all kinds of mineral not occurring in vein or lode formations. This may, for illustration, include gold, iron or precious stones, together with every conceivable character of non-metalliferous deposits, or bodies, occurring in a fluid state, such as petroleum; the only restriction touching area being that each location must not exceed twenty acres in extent, but the same person may enter and locate any number of claims, either contiguous or non-contiguous, by paying the trifling sum of $2.50 per acre and complying with the re-

quirement of the statute as to location, etc. And like power of contract to alienate in anticipation of entry, as in case of lode claims, exists, and has been constantly recognized and enforced by the courts.

The effect of these mineral land laws is that any one of the phenomenally rich men of this country, were he so inclined, could lawfully enter into what in mining vernacular are called "grub stake" contracts, by means of which he could hire a sufficient number of prospectors to locate claims and secure title thereby in *his* (principal's) own name to every pound of unappropriated precious or base ores, imbedded or in place, in the entire public domain of the United States, together with all of the non-metalliferous deposits therein.

The Standard Oil Company—the trust *facile princeps* of all trusts—could in the same manner lawfully acquire title to every acre of public lands containing petroleum which is open to discovery and purchase.

Stone and timber act.

While the stone and timber act evinces a more restricted policy concerning the validity of alienation contracts on the part of timber entrymen, antecedent to entry, than is true of mineral locations, yet the decision of this court, in U. S. vs. Budd, 144 U. S., 154, is to the effect that a person or corporation, designing to acquire title to valuable public timber lands in a given state or district, may lawfully make public announcement that he, or it, is in the market to purchase all of such lands, when entered at a price in excess of that exacted by the government, and in addition that persons qualified to purchase direct from the latter may lawfully apply for and enter such lands, each for himself, to the extent of 160 acres, with the intent and expectation of selling the same after entry to the person or corporation so holding himself or itself out as a prospective buyer of all lands so entered.

That case also recognizes that such prospective dealer or speculator may thus lawfully acquire title to timber lands, without restriction as to quantity, so long as no prior agreement existed between him or it and the entrymen, that the latter should act for him or it in making purchases from the United States.

And under the doctrine laid down in Adams vs. Church, 193 U. S., 510, and in the Williamson case, *supra*, this court went one step farther, and expressly held that, notwithstanding the affidavit required of entrymen by section 2 of the stone and timber act, every applicant for the purchase of such lands may, at any time *after filing his formal verified application to purchase*, lawfully contract with another to sell the land so filed on to the latter, the contract to take effect after final entry, and the fact that no title, either legal or equitable, had passed from the United States to the entryman for the land so contracted to be alienated, and the additional fact that not a dollar of the purchase price therefor had been paid to the government at the time such contract might be entered into, would not affect its validity.

When we say that "no title, either legal or equitable, had passed from the United States," we are justified in so declaring in the light of the rulings of this court in Frisbie vs. Whitney, 9 Wall., 187-197, in the Yosemite Valley Case, 15 Wall., 77-94, and in Whitney vs. Taylor, 158 U. S., 85. In the last mentioned case, it was said:

"By neither the declaratory statement in the pre-emption case, nor the original entry in a homestead case, is any vested right acquired *as against the government.*"

A timber claimant, after filing his initial, verified application to purchase, but before final entry and payment of purchase price, can not, in the very nature of things, be vested with any property right *as against the government*, which is denied to a pre-emption or homestead claimant under similar conditions. Nevertheless, this court held, in the Williamson case, *supra*, that after such timber claimant had filed his initial application, he could lawfully make a contract to convey after purchase, and to procure the making of a similar contract in principle is all that is charged as against the defendants in the pending indictment.

When it is remembered that the coal land act does not exact an affidavit, either *preliminary* or *final*, negativing the existence of a contract on the part of an entryman to convey to another the lands sought to be purchased, and that it does not in any manner declare such contract to be illegal, we enter-

tain a reasonable degree of confidence that the foregoing discussion presents adequate reasons for concluding that congress never intended to prohibit contracts of that nature.

XVIII.

Land office regulations fill no office in the pending prosecution.

The land office regulations in existence during the entire period covered by the dates assigned in the indictment arbitrarily *differentiated* between the procedure exacted in perfecting private *cash* entries of coal land under section 2347, U. S. R. S., from those prescribed, in making *preferential* entries under section 2348, id.

In the first class of entries a non-alienation affidavit was not required by such regulations from the entryman, while in the latter, they compelled the *preferential* entryman to make affidavit at the time of *final* entry, to the effect:

"That I (entryman) make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party."

The prosecution seeks to utilize the quoted portion of the last mentioned affidavit, as a *supplement* to the provisions of the coal land statute, and asserts that the *regulation* exacting such affidavit has the *force and effect of law* in a criminal prosecution for conspiracy upon the facts outlined in the indictment at bar.

In answer thereto we say: The coal land act is *wholly silent* upon the subject of the validity or invalidity of contracts such as are set out in the indictment. Hence, there is neither express, nor implied power, conferred by its terms upon the land department, to regulate, control or in any manner prohibit the making of such contracts. The power delegated to the commissioner of the general land office by the fifth section of the coal land act (section 2351, U. S. R. S.), extends only to the "issue" of "all *needed* rules * * * *for* carrying into effect the *provisions*" of the act.

As the statute made no "provisions" on the subject of contracts such as are under consideration, there was nothing for the department to regulate in that behalf. The rule is well established that statutes conferring *special powers* upon executive

officers, particularly when the liberty of citizens may be affected, are subjected to strict construction.

See

Mechem on Public Officers, sections 511-513.

In Field vs. Clark, 143 U. S., 649, 692, this court, speaking through Mr. Justice Harlan, declared:

"That congress can not delegate *legislative* power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

As we have already shown by a vast array of authority, the prescribing of the constituent elements of a crime is exclusively a legislative function, and, therefore, under the express ruling of this court, any attempt upon the part of congress to vest the land department with the *power to supplement*, by regulations, any legislation of congress, and in turn declare that such regulations, when promulgated, shall constitute an essential element of an offense would be an invalid delegation of power to an executive officer, and hence utterly null and void.

The rule of strict construction in the delegation of powers of the character under consideration, was applied in the recent case of U. S. vs. United Verde Copper Co., 196 U. S., 207, 215. The court there had under consideration the validity of a regulation by the secretary of the interior which prohibited the cutting of timber for smelting purposes under the authority conferred by the act of congress of June 3, 1878, which authorized the felling and removing of timber for "building, agricultural, mining or other domestic purposes * * * subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes."

In holding that the department exceeded its authority in denying the right to fell and remove timber to be used for smelting purposes, the court said:

"If rule 7 (the one in question) is valid, the Secretary of the Interior has power to abridge or *enlarge* the statute at will. If he can define one term, he can another. If he can abridge, he can *enlarge*. Such power is *not regulation; it is legislation*. * * * There is, undoubtedly, ambiguity in the words expressing that power, but the ambiguity should not be resolved to

* * * invest the Secretary of the Interior with the power of legislation."

We submit that this decision alone suffices to uphold our contention that congress did not, in fact, confer, neither did it attempt nor intend to confer, any authority upon the commissioner of the general land office to promulgate the particular rule under consideration.

But we now go one step farther and insist that even if the coal land act was susceptible of the construction that congress intended to confer a discretionary power upon the land department, to require such affidavits as in the judgment of that department might be expedient for the protection of the interests of the government, with reference to matters not *explicitly* legislated upon in the law itself, and that the violation of such regulation should constitute an essential ingredient of a *criminal* offense, with the same force and effect as though the subject-matter of the regulation was writ large in the body of the act, then and in such case the *delegation of legislative authority* in that behalf would be unconstitutional, and the regulation itself should be judicially treated as a nullity for any and all purposes.

This court has, in effect, upheld the correctness of the proposition just stated in U. S. vs. Eaton, 144 U. S., 677.

Numerous decisions of state Supreme Courts to the like effect exist. See:

Dowling vs. Lancashire Ins. Co., 92 Wis., 63, 69-75.
O'Neil vs. American Fire Ins. Co., 166 Pa. St., 72, 79-80.
Anderson vs. Manchester Fire Co., 59 Minn., 182, 195.
Bradshaw vs. Lankford, 73 Md., 428, 431-2.
Ex Parte Cox, 63 Cal., 21.
Schaezlein vs. Cabaniss, 135 Cal., 466, 469.
Rohrbacher vs. Jackson, 51 Miss., 735, 773.

A number of decisions of inferior federal courts are also squarely in point. See:

U. S. vs. Howard, 37 Fed., 666.
U. S. vs. Manion, 44 Fed., 800, 801.
U. S. vs. Bedgood, 49 Fed., 54, 56, 58.

U. S. vs. Maid, 116 Fed., 650.
U. S. vs. Hoover, 133 Fed., 950-2.
U. S. vs. Matthews, 146 Fed., 306-7, 310.

It *may* be that congress, for the protection of its property interests, can clothe the department with power to promulgate regulations which, in turn, for *civil remedial* purposes *only*, will be recognized and enforced by the courts, and some of the cases above cited draw the distinction here noted, but if so, such doctrine is inapplicable here, for reasons elsewhere sufficiently stated.

We may add that any ruling by this court which superficially may seem to imperil the soundness of the proposition now under consideration will be found, upon examination, to be based upon facts and statutes clearly differentiable from those here involved.

The early case of U. S. vs. Bailey, 9 Peters, 238, if cited in opposition to the foregoing mass of authority, is explained in U. S. vs. Curtis, 107 U. S., 671, 675, in a manner which leaves the former as a precedent solely for the peculiar facts involved in that litigation, and accordingly should not be regarded as detracting in any manner from the force and effect to be the subsequent judicial decisions hereinbefore cited.

The *taking of an oath* has always been deemed by the sages of the common law as the most solemn and impressive act associated with legal procedure, and its unauthorized administration was, in effect, regarded by them as a species of contempt against the sovereignty of the crown or state.

Thus Coke, 3d Inst., 165, says:

"An oath is so sacred and so deeply concerneth the consciences of Christian men, as the same can not be ministered to any unless the same be allowed by the common law, or by some act of parliament. Neither can any oath, allowed by the common law, or by act of parliament, be altered but by act of parliament." (Cited in volume 2, Bishop's Criminal Law, page 566 (6th Ed.).

A statute (5-6 Will, chapter 62, section 13) declaratory of this common-law principle was enacted, reading:

"It shall not be lawful for any justice of the peace or *other person* to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit,

or solemn affirmation, touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some *statute* in force at the time being."

Vide:

Roscoe's Cr. Ev. (8th Ed.), volume II, page 1040.

In Norton vs. Shelby County, 118 U. S., 425, 442, this court said:

"An unconstitutional act is *not a law;* it confers *no rights;* it imposes *no duties;* it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

What is true concerning an unconstitutional statute, can, with great reason, be said of a void and unauthorized rule and regulation of a department.

The executive department has no power to enlarge or diminish the requirements of an act, and can not, *ex propriis,* add burdens to its enjoyment.

The effect of the time-honored maxim, permeating every fibre of the common law, "*necessitas quod cogit defendit,*" removes all moral, as well as legal taint, from the entryman's conduct in taking such illegal affidavit, even though the non-alienation statement contained therein might be in fact untrue.

For any and all purposes, therefore, of the case at bar, the regulations should be read as though the particular clause under consideration was omitted therefrom, and likewise omitted from *any and all* applications, etc., filed by the entrymen, respectively, for the purpose of enabling them to make their purchases of the lands in question.

A minor point in this connection may be worthy of consideration, namely: Is a citizen chargeable with notice of the contents of land office regulations? It admits of grave doubt whether this question can be correctly answered in the affirmative. Such regulations may be modified, withdrawn, or altered at any moment at the pleasure of the officer promulgating the same. We know of no law provided for their publication for the general information of the public.

It would certainly be an extreme application of the maxim, "*ignorantia legis neminem excusat,*" to hold that every citizen

is chargeable with knowledge of the contents of departmental regulations existing at any particular instant of time.

Indeed, this court, in at least one instance, expressly held that it would not take judicial notice of an executive regulation. See The E. A. Packer, 140 U. S., 360, 367-368, and in Nagel vs. U. S., 145 Fed., 302, 306, the Circuit Court of Appeals of the Second circuit, expressly refused to take judicial notice of departmental regulations, saying in this connection:

"No department ever sends its compilations of regulations to the judges. They are frequently amended, and, without special information from the department, no one can tell whether a particular regulation in some printed compilation was in force a year later."

The decisions of this court on the subject was commented on, and the conclusion reached that it was not entirely clear what the state of the law was upon the subject, in view of the seeming conflict between the expressions contained in the Caha case, 152 U. S., 211, 221, as contrasted with the remarks of the court in the Packer case, supra.

The pertinence of the point under consideration is, that the indictment does not charge that when the alleged conspiracy was entered into either of the defendants had any actual notice or knowledge of the land office rules, regulations or practices concerning the character of affidavits exacted thereby from preferential coal entrymen. Neither does the indictment allege what the regulations of the department were at that time in that behalf. And in one case, at least, U. S. vs. Bedgood, 49 Fed., 54-58, the court expressly held that in a *criminal* proceeding the court would not take judicial notice of the provisions of such regulations, saying:

"* * * The court does not judicially know what such regulations are, or of any usage under them, and can not know them, or decide what the effect of them is, until they are shown by proof, and such proof can not be taken or considered on a demurrer to the indictment. * * *"

To the same effect, see U. S. vs. Tingley, 5 Peters, 126, where Mr. Justice Story, speaking for the court, said:

"If they (duties of navy pursers) are regulated by the usages and customs of the navy, *or by the official orders* of the navy department, they properly constitute matters of averment and should be spread upon the pleadings."

XIX.

If the court entertains a reasonable doubt touching the rules of law, or either of them, applicable in a criminal proceeding, the defendant is entitled to the benefit thereof.

If we have not fully convinced the judgment of the court, touching the soundness of any vital legal proposition herein discussed, but there nevertheless exists a reasonable doubt in that behalf, then it is the defendants in error, and not the government, who are entitled to the benefit of such doubt, and the judgment below should acordingly be affirmed.

In section 330, Endlich on Int. of Stats., the text reads:

"It may be added that the rule of strict construction in the case of penal statutes requires that where an act contains such an ambiguity as to leave *reasonable doubt* of its meaning, it is the duty of the court *not* to inflict the *penalty*."

To the same effect, see,

State vs. Beck, 21 R. I., 288-295.
Sutherland on Stat. Const., volume 2, page 966.
State vs. Walsh, 43 Minn., 444.
State vs. Krueger, 134 Mo., 262, 271.
State vs. Dailey, 107 N. W., 1094-1095.
Harrison vs. Vose, *supra*.

In conclusion we desire to note that jurists recognize *conspiracy enactments as the most dangerous to the liberty of the citizen* to be found upon the statute books of a state or nation, and this is true, because, by elasticity of judicial construction, cases may be in practice brought within their operation, when the law making power may never have intended that such result should follow.

In many of the continental countries of Europe, conspiracy as a substantive offense has been expressly abolished by legislative enactment.

See,

Wharton's Crim. Law (9th Ed.), volume 2, section 1338.

And in section 1360, id., Mr. Wharton says:

"It is important to keep in mind * * * the principles heretofore announced that indictments for conspiracy, *always*

perilous to liberty from the extent and vagueness of the province which they overshadow, are never so perilous as when they undertake to punish acts of whose intrinsic criminality the law gives no prior notice. If indictments of this class, by stress of settled adjudications, must be hereafter tolerated, the doctrines on which they rest should be carried no further than the *letter* of these adjudications requires."

What the learned commentator means by this last statement is expounded by his remarks in section 1338 of the same volume, where, *inter alia*, he says:

"It is necessary to a *righteous* administration of public justice that punishment should be attached only to acts which are made penal by *rules* which are *pre-announced and constant.*"

Mr. Chitty, in his work on Criminal Law, volume 3, pages 1138-39, after reviewing the entire subject of conspiracy, and noticing the more or less unsatisfactory and conflicting views expressed by the judiciary thereon, concludes, on the latter page, as follows:

"We can rest, therefore, only on the individual cases *decided*, which depend in general on particular circumstances, and which are *not to be extended.*"

In the leading case of Lambert vs. State, 9 Cowen (N. Y.), 577, 597, where the subject of the crime of conspiracy was discussed at great length, Spencer, Senator, in delivering a concurring opinion, after quoting the remarks of Mr. Chitty above cited, adds:

"If the offense is to be declared after the fact, and can not be ascertained before it, we may apply to ourselves the maxim, that miserable is the condition of a people where the law is so vague and uncertain *as to rest only in the breast of the judge.* I am unwilling to sanction any such principles."

We are conscious that the foregoing discussion may be unduly discursive. If so, we plead in mitigation the novelty of the theory upon which the prosecution rests, and the relatively infinite number of legal principles, seemingly apropos, in contesting its tenability.

Moreover, the validity, from a constitutional standpoint, of a policy of a co-ordinate department of the government is here at issue—a policy founded upon what we conceive to be a

strained, unwarranted interpretation of the federal coal land legislation, and when engaged in forensic controversy with so formidable an adversary, prudence dictates that every legitimate weapon of juristic warfare should be called into service.

For more than thirty years the coal land act remained upon the statute books without any federal prosecutor or official having ever suggested that it should perform the office, directly or indirectly, of a penal enactment.

At this late day, however, the claim is advanced that the statute possesses latent, though hitherto unsuspected potency for punitive purposes, a theory so startling and original that it becomes serious and menacing by reason of its innate uniqueness. Hence, we have felt the necessity of leaving no legal principle unnoticed that seemed apposite to the occasion.

In all candor we contend that the foregoing reasoning and cited authorities require an affirmance of the judgment under review.

Respectfully submitted,

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Attorney for Defendants.

JNO. M. WALDRON,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 287.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ROBERT FORRESTER ET AL., DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

G. Q. RICHMOND,
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Since examining the brief of Government counsel we have thought it advisable to offer certain reasons, in addition to those assigned in our original brief, in support of our contention that the contracts set out in the indictment herein are in no respect illegal, and *a fortiori* do not constitute a criminal conspiracy within the purview of section 5440.

We will first briefly review the history of Congressional mineral land legislation including coal, which was enacted prior to the general coal land act of 1873, for the purpose of showing that the uniform policy of Congress has been that a *qualified* entryman of any character of mineral lands might lawfully contract antecedent to final entry to convey the land to another when title has been acquired by the former from the Government, and that such right of contract is in nowise affected by the circumstance that the person

with whom the contract may be made had previously entered mineral lands in his own name.

As a deduction from such premise we will then contend that nothing contained in the coal land act of 1873 abrogates such established Congressional policy.

History of Coal Land Legislation.

The first statute providing in terms for the sale or other disposal of coal lands, as such, was the act of July 1, 1864 (13 Stats. at Large, p. 343), reading as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That where any tracts embracing coal-beds or coal-fields, constituting portions of the public domain, and which, as 'mines' are excluded from the pre-emption act of 1841, and which under past legislation are not liable to ordinary private entry, it shall and may be lawful for the President to cause such tracts, in suitable legal subdivisions, to be offered at *public* sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre; and any lands not thus disposed of shall thereafter be liable to *private entry at said minimum*."

It will be noticed that this act authorizes the President to offer at public sale, to the highest bidder, at the minimum price of $20.00 per acre, any quantity of public coal lands, without any restriction or limitation as to the amount which may be sold to any one individual or combination. Lands once so offered and remaining unsold could be purchased, without limit as to amount, at private entry at said minimum price.

On March 3, 1865, Congress enacted a statute entitled—

"An act supplemental to the act approved first July, eighteen hundred and sixty four, 'for the disposal of coal lands and of town property in the public domain.'"

See 13 Stats. at Large, p. 529.

So much of said act as relates to coal lands reads:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in the case of *any citizen* of the United States who, at the passage of this act, may be in the business of *bona fide actual coal mining* on the public lands, except on lands reserved by the President of the United States for public uses, for purposes of commerce, such citizen, upon making proof satisfactory to the register and receiver to that effect, shall have the right to enter, according to legal subdivisions, a quantity of land not exceeding 160 acres, to embrace his improvements and mining premises, at the minimum price of $20.00 per acre, fixed in the coal and town property act of first July, eighteen hundred and sixty four: *Provided*, That where the mining improvements and premises are on land surveyed at the passage of this act, a sworn declaratory statement, descriptive of the *tract* and *premises*, showing also the *extent* and *character* of the *improvements*, shall be filed within six months from the date of this act; and proof and payment shall be made within *one year* from the *date* of such *filing;* but where such mining premises may be on lands hereafter to be surveyed, such declaratory statement shall be filed within three months from the return to the district land-office of the official township plat; and proof and payment shall be made within one year from the date of such filing."

This act does not profess to either amend or repeal the act of 1864. It simply supplements its provisions by authorizing any *citizen then* (March 3, 1865) engaged in *bona fide* actual coal mining to enter not to exceed 160 acres of land, to include his coal improvements and premises, at $20.00 per acre; entry to be made within time prescribed; and the only proof exacted of entryman was in respect to "*extent and character of improvements*" and that the applicant was a citizen of the United States.

From 1865 until the passage of the general mining act of 1872, there was no statute in existence providing for the *private entry* of coal lands, except on *offered* public lands, as provided by the act of 1864, and between the first-named

dates no law was in force in terms granting *preferential* rights of entry of such lands.

It is manifest that these acts not only evince no *policy* to inhibit a person contemplating the purchase of coal land, either under the act of 1864 or 1865, from making contracts to enter or purchase for the use of another, but, on the contrary, the effect of the acts, taken as a whole, clearly indicates a recognition of the validity of such contracts.

Lode Claim Act of 1866.

The first act ever passed authorizing exploration and purchase of lands containing metalliferous minerals was the act of July 26, 1866 (14 Stats. at Large, p. 251). The statute by its terms was limited to "a vein or lode of quartz or other rock in place bearing gold, silver, cinnabar or copper."

By act of July 9, 1870 (16 Stat. at Large, p. 217), the act of 1866 was amended by adding five additional sections, the first of which provided for the entry of placer claims "including all forms of deposit excepting veins of quartz or other rock in place."

Reading and construing the acts of 1866 and 1870 together, lands containing veins or lodes of quartz containing "gold, silver, cinnabar or copper" were declared open to exploration and entry as lode claims, and all other mineral deposits were made enterable under the provisions applicable to placers.

General Mining Act of 1872.

The act of May 10, 1872 (17 Stat. at Large, p. 91), is entitled "An act to promote the *mining resources* of the United States."

The initial words of the statute are "That *all valuable mineral deposits* in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to *exploration* and *purchase,* and the lands in

which they are found to *occupation* and *purchase,* by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2 reads:

"That mining claims upon veins or lodes of quartz or other rock in place bearing *gold, silver, cinnabar, lead, tin, copper or other valuable deposits,* heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, *and laws in force at the date of their location.* A mining claim located after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than 300 feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation less than 25 feet on each side of the middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary. The end lines of each claim shall be parallel to each other."

By the 10th section of the act it was declared that the said act of July 9, 1870, was kept alive as to future placer locations, except that proceedings to obtain patent thereon should be in conformity with procedure prescribed in case of lode claims.

By section 12, *id.*, the act of 1866, so far as relates to rights of way over public lands to ditch and canal owners, and also act of July 25, 1866, granting certain privileges, etc., to A. Sutro, and likewise preserving "rights of either party to any property in controversy."

The 16th section of the act reads:

"All acts and parts of acts inconsistent herewith are hereby repealed."

It will be noticed that the act of 1872, section 2, enlarges the classification of veins or lodes containing metalliferous ores, enterable as lode locations, beyond the terms of the act of 1866, the additional metalliferous minerals mentioned in the act of 1872, in that behalf, being "lead, tin, or other valuable deposits."

The words "other valuable deposits," under the rule of *ejusdem generis*, would mean other "valuable metalliferous deposits."

The placer feature of the act of 1870 is expressly preserved and continued in force.

The language of the act of 1872 is sufficiently broad and comprehensive to include every character of mineral deposits, including *coal*, and if the coal land act of 1873 had never been enacted it is perfectly clear that lands containing valuable deposits of coal could be explored, worked, and purchased under the placer provisions of the act of 1872.

This is made clear by subsequent legislative interpretation. Thus, in the act of February 18, 1873 (17 Stats. at Large, p. 465), enacted by the same Congress (42d), which passed the act of 1872, relating to lands in the States of Michigan, Wisconsin, and Minnesota, it is provided:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That within the States hereinafter named deposits or mines of iron and *coal* be, and they are hereby, excluded from the *operations* of an act entitled 'An act to promote the development of the mining resources of the United States,' *approved May 10, 1872*, and said *act* shall not apply to *the mineral lands situate and being within the States of Michigan, Wisconsin, and Minnesota, and that said lands are hereby declared free and open to exploration and purchase, according to the legal subdivisions thereof*, as before the passage of said act; and that any *bona fide* entries of such lands within said States, since the passage thereof, may be patented without reference to the provisions of said act."

Here is an unmistakable legislative recognition that the act of 1872 did cover and apply to coal lands.

In Northern Pacific Railroad Company *vs.* Soderberg, 188 U. S., 526, this court, in discussing the scope and meaning of the words "*valuable mineral deposits*" as occurring in the mineral law of 1872, said they "should be construed as including all lands chiefly valuable for other than agricultural purposes and *particularly* as including non-metallic substances among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum limestone, building stone *and coal*. The cases are far too numerous for citation and there is practically no conflict in them."

It thus appears that Congress, as well as this court, has expressly recognized the general mining law of 1872 as being sufficiently broad and comprehensive to authorize the entry of claims thereunder pursuant to the provisions of the act relating to placer locations and entries.

All locations and claims based on the provisions of the act of 1872 have been uniformly held to be property assignable as such, and the right to freely contract in reference thereto, prior to final entry, has been expressly recognized by an unbroke line of decisions.

Hence, prior to the passage of the coal land act of March 3, 1873, the manifest policy of Congress, by all of its mineral land legislation, was to recognize the unquestioned lawfulness of contracts similar to those forming the basis of the pending prosecution.

Now, assuming that the coal land act of 1873 is to be treated as impliedly repealing all pre-existing legislation in conflict therewith, nevertheless, under the rule that statutes *in pari materia* (whether repealed or not) are to be construed together to ascertain the legislative intent, what language is there contained in the coal land act of 1873 which abrogates the avowed pre-existing congressional policy that a locator or lawful claimant of any kind of mineral property

could lawfully contract in advacne of entry to purchase his tract from the Government, and then convey the entered land to the other contracting party?

We say, nothing; the act of 1873 simply restricts any one citizen to *one* entry, not to exceed 160 acres in extent, but not one word will be found therein which necessarily suggests that Congress intended to depart from its pre-existing policy which allowed a claimant to make what contract he pleased in advance of final entry as to the disposition he would make of the land when entered and purchased in his own name.

Restricting each citizen to only *one* entry in his own name of coal land not to exceed 160 acres in amount, but leaving him unfettered to make such contract anterior to final entry as he saw fit touching the conveyance of his tract to another after purchase, fulfills every requirement of the coal land act of 1873, and at the same time gives effect to the uniform, long-standing policy of Congress, theretofore existing, recognizing the validity of such contracts with reference to any character of *mineral* land.

This court has repeatedly held that statutes in *pari materia*, whether repealed or not, are to be read and construed together in order to ascertain the legislative intent with reference to the law which may remain in force. Thus in Vitero *vs.* Friedlander, 120 U. S., 725, the court said:

"It is a familiar canon of interpretation that all former statutes on the same subjects [acts of 1864, 1865, 1866, 1870, 1872, and the coal land act of 1873], whether repealed or unrepealed, may be considered in construing the provisions that remain in force."

The application of the doctrine so announced to the case at bar is this:

First. Coal lands were enterable under the general mining law of 1872, and under such law it is unquestionable that the mineral claimant, anterior to final entry, could lawfully

make any contract touching the disposition of his tract when entry was made thereof, which he might see fit to enter into.

Second. Assuming that the coal land act of 1873 impliedly repealed the mining law of 1872, with reference to *coal land* entries or purchases, nevertheless, unless an express prohibition of the right to make alienation contracts by qualified entrymen prior to final entry can be found in the act of 1873, the previous Congressional policy, recognizing the validity of such contracts, must be still held in force and operative.

Third. The coal land act of 1873 is wholly silent touching the validity of such contracts. Its limitations or prohibitions are confined to restricting the right of entry to the same person or association of persons to one entry for each, but nothing is said in the act evincing a change of policy upon the part of Congress that an entryman who confines himself to one entry may not lawfully make a contract prior to entry to convey his entered tract after final purchase to another, whether the latter had or had not previously exhausted his own right of entry.

Under existing Federal legislation is there any limitation upon the quantity of mineral (coal) lands which may be entered directly by any one person or association of persons?

It is open to grave doubt whether the limitations contained in the coal land act with reference to the amount of coal land which may be entered by any one person or association of persons are now operative in the light of subsequent Congressional legislation.

By the act of August 30, 1890 (26 Stat., 391), it was provided that:

"No person * * * shall be permitted to acquire title to more than 320 acres in the aggregate under all said laws" (public land laws).

By the 17th section of the act of March 3, 1891 (26 Stat., 1095), the foregoing act was amended by declaring that it—

"shall be construed to include in the maximum amount of lands, title to which is permitted to be acquired by one person, only *agricultural* lands and not include lands entered or sought to be entered *under mineral land laws.*"

These two acts taken together are tantamount to a legislative declaration that no person shall be allowed to acquire more than 320 acres of agricultural land, but that any person may enter an unlimited quantity of *mineral lands.*

Coal lands are mineral lands, are so treated by Congress and text writers, by repeated decisions of the Land Department, and by this court as well, and bearing this fact in mind, it is manifest that the *letter* of the act of 1891 validates the contracts here sought to be denounced as a criminal conspiracy, whatever may be said of the *spirit* of such act. We therefore submit that the said acts of 1890-91 remove such contracts from the pale of criminality, howsoever they might be regarded from the standpoint of a court of equity, where liberal construction of statutes for remedial purposes is permissible, but which is not true when the law is sought to be applied in furtherance of penal acts.

Trinidad case, when restricted to special facts there involved, furnishes no aid to prosecution herein.

We assert, with reasonable confidence in the correctness of our position, that the Trinidad case, when analyzed in the light of the facts there in controversy, lends no countenance to the theory that a fraud, either civil or criminal, was contemplated to be practiced upon the United States by the contracts set out in the pending indictment. The salient facts disclosed by the bill of complaint in the Trinidad case, and

all of which were *admitted* by the demurrer of the defendant company, may be thus summarized.

Prior to the making of the entries or contracts involved in the Trinidad case, certain of the *stockholders* of that company had respectively entered in their own names more coal lands than the Trinidad Company was itself authorized by law to enter in its own name, and all of the lands so entered were conveyed by the entrymen to said corporation. Subsequently, another set of stockholders of the same company, together with certain of its employees, were induced by it to enter coal lands aggregating nearly 1,000 acres, all the moneys necessary to pay the Government purchase price, together with the expenses connected with the entries, were to be advanced by the corporation, and the entries were to be made for its sole use and benefit. And this additional quantity (in round numbers 1,000 acres) was entered in part by stockholders and in part by employees of the company, and all of said moneys were paid by the company and the entries were made with the design and purpose of making conveyances to the corporation, and which conveyances were in fact made to it immediately after the entries were perfected. It was this *last* set of entries which were assailed in the Trinidad case, and we assert that in legal contemplation a portion at least of the entrymen were *personally disqualified* from making any entries of coal land in their own name. We here refer to the *stockholders* of the Trinidad Company who participated in making the last set of entries.

In support of our contention that the Trinidad case involved entries by *disqualified* persons, we call the court's attention to the following provisions of section 2350, being the 4th section of the coal land act of 1873. That section in part reads as follows:

"The three preceding sections should be held to authorize only one entry by the same person or association of persons; and no association of persons *any member* of which *shall have taken the benefit of such sections* either as an *individ-*

nal or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and *no member* of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions."

Let us apply the foregoing statement of facts in the Trinidad case to the provisions of the law above quoted.

By reason of the fact that *one set* of *stockholders* of the Trinidad Company having individually entered in the aggregate *more lands* than the corporation itself could directly enter in its own name, and such *stockholders* having conveyed the lands so entered to the corporation, the latter had thereby "taken the benefit of such sections"—*i. e.*, the first three sections of the coal land law. The corporation itself, after such entries were made by its stockholders, and conveyances made by them to it of the lands entered, became thereby disqualified as a legal entity from making any entry thereafter in its own name of any claims whatsoever, and such existing disqualification on the part of the corporation itself in turn operated to disqualify *any* stockholder thereof from making an entry of claims in its own name, whether for his own use or for the use of the corporation. The last clause above quoted from section 2350 furnishes conclusive evidence of the correctness of our contention. That clause reads:

"and no *member* of any association which *shall have taken the benefit* of such sections shall enter or hold any other lands under their provisions."

The stockholders, therefore, who participated in making the last set of entries in the Trinidad case were personally disqualified from entering or purchasing any claims whatsoever. Their entries were therefore clearly illegal, directly forbidden by law, and such entries by disqualified persons were so interwoven and commingled with the entries made by *employees* of the Trinidad Company as to justify a court of equity in canceling all the patents issued upon such en-

tries. This was especially true in the Trinidad case by reason of the fact that it went off in the court below upon a general demurrer to the bill. If the bill stated a good case as to any *one* entry, the demurrer should have been overruled, even though there might have been other entries involved in the litigation, which from a legal standpoint might be unimpeachable to attack.

Now the facts in the Trinidad case are palpably distinguishable from the salient facts in the case at bar.

The indictment herein does not charge that any alleged conspirator was a member of the corporation named in the indictment, to wit, the Calumet Fuel Company, neither is it charged that any entryman was an employee thereof.

It is not charged that any alleged conspirator had ever entered any coal land prior to the formation of the alleged conspiracy or the entry of any of the lands in controversy, neither is it charged that the Calumet Company had ever entered any coal land, or that any stockholder (member) thereof had ever entered a foot of coal land, neither is it charged that the Calumet Company was a party to the conspiracy or was ever cognizant of its existence.

We thus discover from the averments of the indictment, or, more accurately speaking, from the omission of averments in the indictment, that each and every entryman designed by the supposed conspiracy to make entries of the lands in controversy herein, were each and all severally qualified and lawfully authorized to make the identical entries, and each of them which in fact were made. There is no element, therefore, of *personal* disqualification of any entryman, which element was present in the Trinidad case, and which fact was made the *chief point of attack* by the Attorney General who filed the brief in the Trinidad case in behalf of the Government and this court. The Trinidad case, therefore, when restricted and limited, as properly it should be, to the special facts in litigation, furnishes no authority for the broad contention now advanced by Government counsel, that if in-

dividuals who are not members of a corporation enter into contracts with qualified entrymen to enter coal lands with the design of ultimately securing the conveyance of the lands when entered to a stranger corporation for some undisclosed consideration—which is this case—that in such event the entries or either of them would be fraudulent.

Neither does the Trinidad case decide the broad proposition now relied upon by the Government, that if A has exhausted his right of entry under the coal land law he cannot thereafter lawfully contract with B (in all respects a qualified entryman), that the latter shall enter a tract of coal land, and for an agreed consideration to convey the entered land to A after final purchase. In brief, the ruling in the Trinidad case should be limited and confined to cases where contracts are entered into by persons disqualified to enter coal lands with other persons, who in turn are also disqualified in that behalf, and neither of these elements are present in the case at bar, or for that matter in any of the Colorado coal land cases now pending in this court.

For the foregoing reasons, we submit that the judgment of the court below was correct and accordingly should be affirmed.

Respectfully submitted.

G. Q. Richmond,
Attorney for Defendants in Error.

John M. Waldron,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 287.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ROBERT FORRESTER ET AL., DEFENDANTS IN ERROR.

REPLY BRIEF OF DEFENDANTS IN ERROR.

Government counsel relies upon decisions of Land Department to uphold their construction of Coal Land Law. We answer that such decisions are valueless, because the Department has boxed the compass in this behalf, by changing its construction from time to time to fit its particular policy prevailing at any given period. To illustrate:

In the McConnell case, 18 Land Decisions, 414, decided in 1894, the then Secretary of the Interior decided, with reference to the privilege of assignment of the right to enter by coal preferential entrymen, that "This right is a *valuable property right*, and independent of statutory prohibition may be assigned."

Now, in the coal land regulations promulgated by the same Department, of date April 12, 1907, p. 5, 35 L. D., 665, it is declared:

"Assignment of a preference right of entry under section 2348, Revised Statutes, will not *hereafter* be recognized."

Here is found not only a direct conflict in ruling, but a manifest attempt to amend or repeal an act of Congress by departmental regulations.

Again, in the Allen case, 8 L. D., 140-3, the Secretary held, with reference to contracts of the exact character involved herein, that the person contracting with coal entrymen was "*quite innocent of any wrong intent.*" If this be true, how can criminal conduct be predicated thereon?

An examination of the coal land regulations of 1907 will disclose that virtually the entire pre-existing theory of the Department concerning the scope of the coal land laws, as shown by previous regulations, is changed in divers fundamental particulars, and a careful review of its decisions will disclose manifest conflict in rulings on divers important features of the law.

Moreover, this court has held in numerous cases that a settled policy of the Department will not control in the construction of any act of Congress. See particularly:

Dewey *v.* U. S., 178 U. S., 510-21; St. Paul, etc., Co. *v.* Phelps, 137 U. S., 528-536; Bate, etc., *v.* Sulzberger, 157 U. S., 1, and by Circuit Court of Appeals of 8th Circuit in Deming *v.* McClaughry, 113 Fed., 639-641.

The letter of the Commissioner of the Land Office to Congress, before the enactment of the coal act of 1873, is also relied upon to uphold contention of Government counsel.

We answer, such letter affords no evidence of congressional intention in subsequent passage of act. The language of the Commissioner, moreover, is entirely consistent with our construction. What he there said about prevention of monopoly simply means that he desired to prevent the whole-

sale direct purchase of coal lands by one person in his own name to an unlimited amount, which was lawful under then existing law.

The Commissioner was not considering the question of the right of a qualified entryman to contract anterior to entry to convey his land after entry to another.

Again, Government concedes that one person or corporation may purchase in the aggregate all the coal lands in a given State from entrymen the instant after each has made his final entry. This shows that monopoly of acquisition was not considered by Congress. Only limitation intended was that one person or corporation should not be allowed by one series of entries to purchase all the coal land in a given region, thus depriving all others of any benefit whatever of the coal land law.

Defendants' construction of coal land act of 1873 is supported by fact that Congress in enacting said statute, thereby withdrawing coal lands from entry under general mining law of 1872, did not insert specific prohibitions, forbidding alienation contracts by entrymen or those qualified to enter coal lands prior to final entry, as it had done in the Homestead and Pre-emption statutes theretofore passed by it.

Such departure from preceding public land legislation is significant, and must have been intentional, not accidental. The later stone and timber and timber culture acts specifically forbid an entryman to sell or contract to sell his right of entry prior to final purchase from the Government.

When Congress so failed to prohibit such contracts in coal land act, rationale of following decisions denies right of judicial legislation under guise of construction to accomplish such end:

Maxwell *v.* Moore, 22 How., 185; Myers *v.* Croft, 13 Wall., 291; Gilbert *v.* Thompson, 14 Minn., 544; approved in Myrick *v.* Thompson, 99 U. S., 291; U. S. *v.* Budd, 144 U. S., 154; Hafemann *v.* Gross, 199 U. S., 342; Adams *v.* Church, 193 U. S., 510; Hartmann *v.* Butterfield Co., 199 U. S., 335; Williamson *v.* U. S., 207 U. S., 425.

If Congress actually intended to prohibit the acquisition of more than 160 acres of coal land by one individual, either directly through open purchase or indirectly through contracts with others, why did it by act of February 18, 1873, 17 Stats., 465, declare that all coal lands in Michigan, Wisconsin, and Minnesota should be enterable under agricultural land laws, and likewise in Missouri and Kansas, by act May 5, 1876, 19 Stats., 52, and in Alabama by act March 3, 1883, 22 Stats., 487?

Here are six States, known to contain vast bodies of coal deposits, wherein Congress, in express terms, provided a radical different policy with reference to entry than that declared with reference to coal lands in the States west of Kansas.

In the six States named a greater quantity of coal lands could be directly acquired from the Government by the individual citizen than is true of coal lands in the remaining States—that is, a citizen could lawfully enter at least 320 acres of coal lands in said six States, 160 acres under the homestead and 160 acres more under the pre-emption law—and possibly a still greater quantity under other agricultural land laws, but he could not lawfully contract to sell before entry, because the agricultural laws expressly forbade it.

Moreover, in said six States a corporation could not directly enter any coal land whatever, as none but individual citizens were authorized to enter lands under said agricultural laws.

But in the States west of Kansas corporations as well as individuals could lawfully enter coal lands under the coal land act of 1873, the only limit prescribed being as to the amount which could be entered, but with no prohibition as to contracts with qualified entrymen prior to entry to convey land by latter when entered.

We submit it is nothing short of sheer judicial legislation to hold that in the Rocky Mountain region there exists any invalidity from either a civil or criminal standpoint in the making of contracts forming the basis of pending prosecutions.

In conclusion, we note Attorney General, in discussing Trinidad case, ignores point that contracts there assailed were made by a disqualified corporation, or for its benefit with certain entrymen, who in turn were disqualified to enter.

These circumstances distinguish that case from every coal entry involved in any and all cases now before the court, and any general language in the opinion in that case, going beyond the facts there in controversy, are of no force as authority herein.

We desire to impress the court with the importance of carefully noting the economic reasons pointed out on pages 67 to 73 of our original brief herein as furnishing conclusive reasons why Congress never in fact intended to legislate in the coal land act as contended for by opposing counsel.

Congress must be presumed to have been cognizant of existing natural conditions, which would virtually prevent the average citizen from ever obtaining any benefit from such legislation if Government's theory of law be sound. Indeed, we can truthfully say that if such theory had been acted upon and observed the coal lands of the western States could never have been developed and the growth of the mountain

States of the West would have been retarded to an incalculable extent.

The coal lands of the Rocky Mountain region have in fact been developed and purchased in direct opposition to the Government theory, and if these defendants are guilty of a criminal conspiracy there would be scarcely room enough in the penitentiaries of the country to contain other citizens who are equally guilty; and in not a single instance did any one suppose that the law was being violated.

Respectfully submitted,

JOHN M. WALDRON,
Attorney for Defendants.

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Office Supreme Court, U. S.
FILED.
OCT 21 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 291.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES E. HERR AND GEORGE C. FRANKLIN.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

B. W. RITTER,
N. C. MILLER,
Attorneys for Defendants in Error.

(21,033.)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 291.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES E. HERR AND GEORGE C. FRANKLIN,
DEFENDANTS IN ERROR.

INDICTMENT FOR CONSPIRACY TO DEFRAUD THE UNITED STATES UNDER SECTION 5440, R. S. U. S.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

This cause comes here on writ of error to review the judgment of the District Court of Colorado sustaining a demurrer to the indictment.

If any authority exists for the prosecution of the writ of error, it is to be found in the act of March 2, 1907 (34 Stat. L., 1246).

The indictment attempts to charge a conspiracy to defraud the United States under section 5440, R. S. U. S. In this respect it is similar to the indictment in the Forrester case (No. 287) and differs from the second count of indictment in the Keitel case (No. 286). It also differs from the first count in the Keitel case (No. 286), in that there is

no charge that any forged, fictitious, or feigned papers (by reason of not being under oath, etc.) were to be presented.

The defendants and two other persons, who are named, are alleged to have agreed between themselves and with "divers others" to induce qualified persons to enter and purchase 960 acres of vacant, unoccupied, and unreserved public coal lands; the entries to be made under the coal land laws at the price fixed by law and in quantities not exceeding the amount allowed by law to each of such persons respectively; the entrymen to be induced (for an unknown consideration) to agree to convey to defendants, or to some person or corporation to be named by them, the lands so purchased by each.

Certain overt acts, all lawful in and of themselves, are set out and alleged to have been done in pursuance of and to effect the object of the alleged agreement. These overt acts appear to have been the filing of documents, statements, and affidavits in the matter of "coal cash entries" (overt acts 1 to 6, pages 4, 5, and 6); in making or presenting non-mineral or corroborating non-mineral affidavits in the matter of such entries (overt acts 7 to 12, inclusive, and 14 and 16); in writing certain letters (overt acts 13 and 15), and in opening coal mines on the premises (overt act 17).

None of these acts appear to be or are charged to be in themselves wrongful or unlawful. There is absolutely no allegation that any of the persons who were to make the entries were not fully qualified to make such entry, or that it was proposed to obtain the lands at a less price than the price fixed by law, or that applications were to be made under any law other than the coal land act.

There is absolutely no allegation that the defendants, or any of their alleged co-conspirators, were not qualified under the law to make entries in their own names, or that any of such persons had ever exercised their rights or held any lands under the coal land act.

The allegations show that there must have been at least

six "co-conspirators," and that the amount of land which they sought to acquire was 960 acres—apparently not more than they might themselves lawfully have taken in six tracts of one hundred and sixty acres each.

In other words—so far as appears from the indictment—both the entrymen and the "conspirators" were fully qualified to acquire direct from the United States the full quantity of land which it is alleged was sought to be obtained.

There is no allegation or claim that there were any rival claimants or any conflicting claims to any of the lands. On the contrary, the allegation of the indictment is that the lands were "surveyed, vacant public lands of the United States, known as coal lands, not then otherwise appropriated or reserved by competent authority, or containing valuable minerals other than coal, which were then open to entry at the United States land office at Durango aforesaid, under the laws of the said United States pertaining to the entry and sale of such coal lands and under the rules and regulations theretofore made and prescribed, pursuant to law, by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior" (Record, page 3).

The direct allegations of the indictment are that the entries were to be made under the coal land laws applicable thereto, in the quantities allowed by law to each entryman, and at the price fixed for such land. No question as to the respective rights of rival claimants or conflicting claims arises. The supposed illegality of the transaction lies in the charge that it was the design of defendants and their co-conspirators to furnish the money to pay for the land, and, for an unknown consideration, to procure the entrymen to convey the lands to them, after entry, but pursuant to agreement to that end previously made; and in the charge that the agreement contemplated that at the time of making his entry each person should make certain statements not required or provided for in the law itself.

It is also charged, as a *conclusion of the pleader merely,*

that by such entries the defendants and their co-conspirators would obtain title to more of such lands than they could lawfully obtain direct from the Government; but as there is no charge that either the entrymen or the alleged "conspirators" were disqualified, and as the amount of land sought to be obtained is limited to 960 acres, it is difficult to see how this conclusion is supported by any *facts* properly charged; and the allegations of the indictment give, as we believe, no foundation for designating the entries or the entrymen as "dummy."

The indictment characterizes the proposed entries as false and fictitious and abounds in epithets; but the whole gist of the alleged offense, as shown by the *facts* charged, is, we think, comprised in the above statement.

The question whether there was any such construction of the statute upon which the indictment was founded as to give this court jurisdiction of this writ of error has been argued by counsel in the Keitel case, and we deem it unnecessary to do more than to state the question and refer to the arguments there made and the authorities there cited.

The general propositions of law involved in this case are the same as those which arise and are argued in the case of The United States *vs.* Keitel *et al.*, No. 286, and United States *vs.* Forrester *et al.*, No. 287, at this term of court, and it is unnecessary for us to go into a repetition of the arguments there presented. By permission of counsel we refer to those briefs as fully supporting our contention that the indictment does not charge an offense under section 5440, R. S. U. S.

But this case can be distinguished from the Forrester case by the fact that there is in this case no charge that the persons by whom the title was to be eventually acquired were themselves incompetent or disqualified to acquire such title direct from the Government.

The entire absence of any such allegation takes this case, as we think, entirely out of the operation of the rule announced in the Trinidad case, relied upon by the Government.

The Government assumes that the entries to be made involve "preferential rights." We find nothing in the indictment upon which this assumption can be based. The direct allegation that the lands were "*vacant public lands of the United States, known as coal lands, not then otherwise appropriated, . . . which were then open to entry,*" would seem to indicate a purchase by direct private cash entry under section 2347.

In the overt acts the entries are said to be "coal cash entries," apparently indicating a direct purchase under section 2347.

But, in any event, it is clear that there were no conflicting claims to any of the lands. The averment that the lands were "*not then otherwise appropriated*" necessarily precludes all idea of any rival claimants or conflicting claims.

Priority of possession and improvement may become important in case of conflicting claims (section 2351), but where there is only one applicant no question of preference or priority of right can arise. In such cases the rights of the applicant depend solely upon the question whether he possesses the necessary qualifications under the express grant of right given by section 2347.

This view accords with the repeated rulings of the Secretary of the Interior. In cases where declaratory statements have been filed, the validity of such statements and the existence of a "preference right" have been held wholly immaterial on an application to purchase, unless there exists a valid conflicting claim. In the absence of such conflicting claim, the applicant, though claiming under a declaratory statement, need only show that he possesses the qualifications prescribed by section 2347 and that the land is coal land; whereupon, on payment of the proper price, he is entitled to make the entry.

McKibben vs. Gable, 34 Land Decisions, 178:

In this case, on July 26, 1902, Gable filed, under section 2349, a declaratory statement for certain lands. On May 11,

1903, McKibben filed, under the same section, a declaratory statement for the same land. On May 16, 1903, Gable applied to purchase. Notice was given McKibben to show cause, if any, why the application of Gable should not be allowed. On the day named McKibben appeared and filed a protest against Gable's application. The protest contained no assertion of right of McKibben other than as claimant under his declaratory statement. It charged in substance that Gable's application to purchase should be rejected because Gable had not opened, exposed, developed, or improved any mine upon the premises.

It appeared from the evidence, and was admitted, that neither McKibben nor Gable had made any improvements or opened any mine upon the premises, and the contention of McKibben was that, as he was not applying to purchase, no such showing was necessary upon his part at that time, but that the fact that no such improvements had been made must necessarily defeat the application of Gable. After showing that the preference right is not created or initiated by the filing of a declaratory statement, but can be acquired only by the opening, improving, and having possession of a mine of coal on the public land, and that the office of the declaratory statement is merely to preserve the right—not create it—and that if the right does not exist the declaratory statement is without force or effect for any purpose, the Secretary says (pages 181, 182):

> "Under the conditions thus admitted, as well as shown by the evidence, it is clear that McKibben's declaratory statement was filed without authority of law, having no basis to rest upon, and can avail him nothing in this case. He obtained no preference right of entry, and therefore his declaratory statement had no office to perform, and was, so far as this record shows, without legal force or effect. It follows that McKibben has no valid claim to the lands in controversy.
>
> "By section 2347 it is provided that any person possessing the necessary qualifications may, upon ap-

plication to the register of the proper land office, purchase and enter not to exceed one hundred and sixty acres of vacant coal lands of the United States. All that is required of an applicant to purchase is that he shall show himself qualified to enter, shall show that the lands applied for are of the character subject to sale, and shall pay the Government price therefor.

"Are the lands in controversy of the character subject to sale under the coal land laws? If they are, McKibben's declaratory statement being out of the way, there would appear to be no obstacle to the completion of Gable's purchase. It is not in all cases essential to the validity of an application to purchase coal lands, or to the completion of proceedings thereunder, as contended by counsel for McKibben, that the applicant must show that he had actually opened and improved a mine of coal on the lands applied for. This is necessary only where the applicant asserts a preference right of entry under the statute *and must maintain his assertion or suffer defeat in favor of another applicant or claimant.* In such a case, to establish his claimed preference right of entry, the applicant would have to show that he had opened and improved a mine of coal on the lands, and was in actual possession of the same.

"This is not a case of that kind. To sustain his application to purchase, in the absence of any lawful claim by McKibben, Gable is not bound to rely upon his declaratory statement, and is therefore not required to show the existence of a preference right of entry under it. He may rest his claim upon his application to purchase irrespective of any question of right under his declaratory statement, and it is therefore unnecessary here to consider whether his declaratory statement was a valid one or not."

A motion for review in this case was overruled (34 L. D., 447).

Lehmer vs. Carroll, 34 L. D., 267:

In this case a number of persons had filed separate declaratory statements for coal lands. They afterwards, by deed, released and quitclaimed the lands to the associated

applicants in the case, and these applicants, with their application to purchase, presented these deeds and made their claims under the declaratory statement so filed by the individual, not having filed any declaratory statements of their own. Lehmer, who did not appear to have any interest in the land, protested against the entry, charging, among other things, that no preference right of entry was acquired by any of the parties from whom the applicants obtained these deeds, because none of them ever opened or improved any coal mine or mines on the lands; wherefore the declaratory statements were illegal and of no effect. Referring to this ground of protest the Secretary says (pages 268 and 269):

> "Under the facts disclosed by the record, it is obvious that the first and second charges of the protest relate to immaterial matters and raise no question for departmental inquiry. In the first place, upon failure of the coal declarants to appear and show cause against the application to purchase, after being notified to do so, they ceased to be parties to the record and were thereafter out of the case. This left the record clear of any claim to the lands other than that asserted by the associated applicants to purchase, and it could make no difference to them, or to the Government, whether the coal declaratory statements were valid when filed or not. In the second place, it is not essential to the validity of the application to purchase that the associated applicants should have opened and improved a mine or mines of coal on the several tracts of land applied for. In this particular, aside from the requirement involved in the third charge of the protest, it is sufficient that the proofs show the lands to be of the class and character subject to disposal under the coal land laws (McKibben *vs.* Gable, 34 L. D., 178)."

This case was again before the Department on motion for review (Lehmer *vs.* Carroll, 34 L. D., 447), where the motion for review was denied and the provisions involved were discussed at considerable length.

After saying that the office and purpose of the declaratory statements was simply to give notice of and preserve a

preference right of entry already acquired, and that, except in case of conflicting claims, it has no function under the statute, the Secretary says (pages 451 and 452):

> "And in such a case, even were the claimants to fail to make application to enter and to pay for the lands within the sixty days allowed by section 2349 for filing the declaratory statement, neither their failure in this respect nor their failure to file a declaratory statement would operate to forfeit their right to purchase and enter the lands except in favor of some other qualified applicant. Their preference right of entry would be gone, but the forfeiture provided by section 2350, upon failure to file a proper declaratory statement, or to pay for the lands within the required period, would operate only to render the lands subject to entry by another qualified applicant. In the absence of any other qualified applicant, there would be no forfeiture, because there would be no one in whose favor the forfeiture could operate; and there is nothing in the statute that would prevent the claimants, as between themselves and the Government, from paying for and entering the lands, provided the law be complied with in other respects. Such is in substance the holding in the decision complained of, and the holding is clearly right. Any other construction would not only give rise to confusion, but would be contrary to the spirit and plain intent of the statute."

See also, as sustaining the above cases, *In re* Chas. S. Morrison (36 L. D., 319).

In view of these authorities, the suggestion of the Government that this case can be differentiated from the Forrester case by reason of the charge that no improvement had been made is without merit, first, because, as we contend, it does not appear from the indictment itself that any claim had been or was being made under section 2348 or section 2349; second, because, in the absence of any conflicting claim, the only material questions were whether the land was coal land and whether the applicant possessed the qualifications pre-

scribed by section 2347, even though the applicant might theretofore have filed a declaratory statement for the land.

The cases above cited conform to the uniform ruling and practice of the Department and seem to us to give the proper construction to the law. In any event, they show the theory and action of the Department, and it would be singular indeed if a citizen could be criminally prosecuted for doing that which the Department had held might properly be done.

Our position upon this proposition is that, while we do not concede that the indictment shows that any question as to preferential claim or right was involved; yet, even if the assumption of the Government be correct, the fact that a declaratory statement had been filed would not, in the absence of a conflicting claim, impose any greater burdens upon the applicant than would be imposed upon him in making a private entry under section 2347; nor would he be required to show either possession or improvement of the land.

As before stated, we shall not undertake to repeat the arguments presented by counsel in the other cases, but will content ourselves with saying that this indictment is subject to the same objections urged in the other cases, and with permission of counsel in those cases, we refer to their arguments and the authorities cited in their brief without repeating them here.

The decision in this case is upon a demurrer to the indictment, and, while the argument must admit all facts well pleaded in the indictment, we wish to expressly deny that there are, in fact, any false statements made in the affidavits.

We ask that the writ of error be dismissed:

(1) Because the court has no jurisdiction of the writ; and

(2) Because the indictment does not sufficiently charge any offense.

Respectfully submitted,

B. W. RITTER,
N. C. MILLER,
Attorneys for Defendants in Error.

In the Supreme Court of the United States.

No. 292

Office Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES E. HERR, DEFENDANT IN ERROR.

Indictment under Section 4746, R. S. U. S., for presenting false papers to the Secretary of the Interior.

MOTION FOR SEPARATE HEARING.

B. W. RITTER,
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Attorneys for Defendant.

Smith-Brooks Press, Denver.

In the Supreme Court of the United States.

No.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES E. HERR, DEFENDANT IN ERROR.

Indictment under Section 4746, R. S. U. S., for presenting false papers to the Secretary of the Interior.

MOTION FOR SEPARATE HEARING.

Comes now the defendant, Charles E. Herr, in the above-entitled cause of action, and moves that an order be entered granting this defendant a separate hearing of this cause from other cases pending in this court, wherein the subject matter relates to indictments concerning the purchase of coal land and brought into this court by a writ of error from the District Court of the United States sitting in and for the state of Colorado, said causes being numbered on the docket at the October Term, A. D., 1908, as follows:.....

.....

For ground of said motion this defendant respectfully alleges:

1. The defendant in this case is charged with unlawfully, knowingly and wilfully, by solicitation and inducement, procuring a certain person to make and subscribe and present to

the Secretary of the Interior of the United States, by and through the Register and Receiver of the United States Land Office at Durango, Colorado, on January 31, 1906, through her agent, the defendant, a certain false and fraudulent declaration in the form of an affidavit at purchase, to wit, a declaration in the form of a coal land affidavit at purchase.

This indictment is drawn under section 4746, R. S. U. S.

The following points were decided concerning section 4746, R. S. U. S.:

(a) That statute was held to relate only to pension matters.

(b) The facts stated in the indictment were held to show that the papers were presented to the Register and Receiver of the local Land Office and not to the Secretary of the Interior, and that no matter was shown to be pending over which the Secretary of the Interior had jurisdiction within the meaning of that statute.

2. The substantive crime charged in this case is the alleged offense of procuring a false affidavit to be used concerning a matter alleged to have been within the jurisdiction of the Secretary of the Interior. In the other cases the main charge is conspiracy either to obtain lands by means of alleged fictitious entrymen or a conspiracy to procure false affidavits to be used concerning a matter alleged to have been within the jurisdiction of the Secretary of the Interior. The essential allegations in this indictment must materially differ from the required allegations in those indictments, and an inspection of the indictment shows that the allegations do differ. But it is our contention that the indictment in this case is totally deficient under section 4746, R. S. U. S., a question which does not arise and cannot arise in the other cases.

(a) The indictment fails to state any subject matter concerning which the alleged affidavit was used.

(b) The indictment does not show that an affidavit was ever presented to the Secretary of the Interior.

(c) The indictment fails to show any matter pending before the Secretary of the Interior or within his jurisdiction concerning which the affidavit could be considered.

(d) Every action taken as stated in the indictment is one which could take place only before the Register and Receiver.

(e) The indictment fails to describe any land, and certain land must be specifically described to make the indictment valid.

(f) The discussion of these points require the consideration of the relation existing between the Register and Receiver and the Commissioner of the General Land Office and the Secretary of the Interior.

3. The main matter involved in the consideration of this case is the sufficiency of the indictment under section 4746, R. S. U. S., keeping in mind that the substantive crime in this case is the charge that the defendant procured a false affidavit to be used concerning a matter within the jurisdiction of the Secretary of the Interior.

4. There is another indictment pending against this defendant and others which is similar to the case of the United States vs. Forrester et al., and the brief and argument in the Forrester case will cover the conspiracy against this defendant and others in that case. But there is no case to be argued which will cover the issues raised in the case of the United States vs. Herr, and numbered on this docket as....., and defendant alleges that he will be greatly prejudiced unless his case is heard separately.

Wherefore, This defendant prays that this cause be set down for argument, separate and apart from the other cases pertaining to coal land entries, in order that he may present the special features of this case to this honorable court for its consideration.

Respectfully submitted,

B. W. RITTER,
N. C. MILLER,
Attorneys for Defendant.

In the Supreme Court of the United States.

October Term, 1908.

No. 292

Office Supreme Court
FILED
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JAMES H. McKE

THE UNITED STATES, Plaintiff in Error,

vs.

CHARLES E. HERR, Defendant in Error.

BRIEF AND ARGUMENT ON BEHALF OF THE DEFENDANT.

Indictment under 4746 R. S. U. S., for presenting false affidavit to the Secretary of the Interior.

B. W. RITTER,
EDGAR BUCHANAN,
H. C. MILLER,
Attorneys for Defendant in Error.

Smith-Brooks [redacted] Press, Denver.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CHARLES E. HERR, DEFENDANT IN ERROR.

Indictment under 4746 R. S. U. S., for presenting false affidavit to the Secretary of the Interior.

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT.

This writ of error is prosecuted under the supposed authority of the Act of March 2, 1907, 34 Stat. L., 1246.

The indictment contains two counts, both of which are drawn under section 4746, R. S., as amended by the Act of 1898.

The counts are similar in form, and the supposed offenses attempted to be charged of procuring or presenting to the Register and Receiver at the United States Land Office at Durango, Colorado, two "declarations in the form of a coal land affidavit at purchase," each of which is alleged to have contained false matter.

There is no substantial difference between the two counts, except that the papers presented appear to have been executed by different persons and refer to different lands.

This case stands upon a somewhat different footing from the other cases brought up for review from the said court, and we desire to call attention to the following matters which seem to be important as bearing on the question of the jurisdiction of this court or the sufficiency of the indictment, if the case is to be heard on its merits:

1. There is no attempt in either count to charge a conspiracy. The sole offense, if any, consists in the procuring or presenting of the declarations.

2. There is no charge of an intent to defraud the United States, or of an attempt to obtain any money or property or the approval or payment of any account or claim.

3. There is no showing whatever as to what, if any, account, claim, application or proceeding was to be or had been anywhere instituted, or was then pending for consideration or determination, in connection with, or in relation to, or in support of which the papers were made or used or were intended to be made or used.

4. While the supposed offense is alleged to consist of the presentation of these papers to the Secretary of the Interior, the *facts* alleged show that they were presented to the Register and Receiver of a local Land Office, and not to the Secretary.

5. It is not charged and does not appear that the paper or affidavit was required or provided for by any statute or law of the United States.

6. It does appear from the face of the indictment that the paper did *not* relate to any claim for pension or for bounty lands.

7. There is no charge or allegation that either document contained any false statement in respect to the qualifications of the affiant to purchase coal lands (as such qualifications are prescribed by statute) or that it was false in any particular as to which a showing is required or limitation prescribed by statute.

8. There is no attempt to charge perjury or subornation of perjury.

9. It is not charged that the documents, or either of them, were forged, or counterfeit, but only that some of the statements therein were in fact untrue.

The entire absence of the elements of conspiracy and of intent to defraud, as well as the lack of sufficient direct averment as to other essential matters (particularly as indicated under the third heading above) make this case, as we are advised, to that extent, different from any of the others.

Under the form and wording of this indictment sufficient objections were presented to the court below to sustain its action, as we believe, irrespective of any question as to the validity or construction of any statute, and irrespective, also, of the objections common to this and other cases.

It is, then, our contention:

1. That this court is without jurisdiction because the judgment and decision sought to be reviewed was not "based upon the invalidity or construction of the statute upon which the indictment is founded," but was in fact based upon defects inherent in the indictment itself and not involving either the validity or construction of any statute; the other grounds being of themselves sufficient to sustain the action of the court.

2. That grounds of objection, not involving the validity or construction of any statute sufficient, if well taken, to defeat the indictment, were presented to and considered by the court below.

And that, when such fact appears from the record, this court will not consider whether the action of the court below was erroneous as to any such question, but will dismiss the proceeding or affirm the judgment.

3. That, in any event, the indictment is bad because of other objections, regardless of any question of the validity or construction of any statute.

4. That the opinion expressed by the trial court as to the scope of section 4746 was not erroneous, though such opinion was not, as we understood the record, necessary to sustain the action taken, nor was such action based thereon.

5. That if it be assumed that the documents set out in the indictment related to any pending matter, proceeding or

claim, the statements therein which are alleged to be false are wholly immaterial, are not required or provided for by any law and cannot be made the basis of a criminal prosecution.

INDICTMENT.

The indictment is set out in full in the record, pages 1 to 8, and later on we shall have occasion to quote from it at length.

Substantially, it charges that the defendant procured to be made and presented to the Register and Receiver of the Land Office at Durango, Colorado, and through said officers to the Secretary of the Interior, "a certain false and fraudulent declaration in the form of an affidavit at purchase, pertaining to a certain matter hereinafter described, which was then and there a matter within the jurisdiction of the said Secretary of the Interior" (setting out the so-called "declaration" alleged to have been procured and presented).

"Which said declaration then and there contained, amongst other things, certain statements which were material to the said matter within the jurisdiction of the said Secretary, that is to say:"

(Then follows the statements which it is charged the "declaration" contained. Thereupon the indictment continues):

"The said statements in the said declaration then and there being material in the matter aforesaid in this, that it was necessary, in order to the due administration of the said laws by them, the said Secretary of the Interior and the said Register and Receiver of said Land Office should thereby be truly informed" (as to certain matters which are set out in detail in the language of the declaration).

"And which said declaration then and there, as he, the said Charles E. Herr, then and there well knew, was a false and fraudulent declaration, and one containing false and fraudulent statements, material to the matter aforesaid in this:" (Here follows an attempted statement of the particulars in which the declaration contained false statements, none of the statements

showing the qualification of the affiant to purchase coal lands, as those qualifications are prescribed by the statute, being charged to be untrue.)

"That the land first above described in this count of this indictment was then and there coal land of the said United States, open to purchase and entry as coal land." (Then follows the closing paragraph.)

"That the said Charles E. Herr, at the time and place and in the manner and form aforesaid, unlawfully, knowingly and willfully did procure the making, subscribing and presenting of a false and fraudulent declaration in the form of an affidavit at purchase pertaining to a matter within the jurisdiction of the Secretary of the Interior; against the peace and dignity," etc.

There is no direct charge that defendant, or affiant or any one else had made any application to purchase the land or that any proceeding was pending; no primary facts are alleged from which the court can say that the jurisdiction of the Secretary or the local officers was invoked or proposed to be exercised.

It is not alleged that the so-called "declaration" was an application to purchase. Indeed, as will be shown later on, it is perfectly apparent that it could not have been such application: nor is there any allegation that it was presented in support of an application to purchase.

We are not shown how, or for what reason, "it was necessary to the due administration of the said laws" that the Secretary or any one else should be truly, or at all, informed as to the matters stated.

We have only the bald conclusion of the pleader, unsupported by the charge of any primary facts, that the statements were material to a matter, not identified or described, within the jurisdiction of the Secretary.

The "declaration" which it is alleged was presented, is set out at page 2 of the record.

The second count is the same as the first except as to the description of land in the declaration and as to the affiant.

It will be noticed that the truth of the statements that affiant was 21 years of age, was a citizen of the United States

and that she had never, either as an individual or as a member of an association, had the benefit of a coal entry (being the only limitations mentioned in the statute), are not controverted.

It will be further noticed that, while the information states that the affidavit pertained "to a certain matter *hereinafter described*," which was then and there "within the jurisdiction of the said Secretary of the Interior," no matter is thereafter or at all described, and we are left entirely in the dark as to what matter is supposed to have been within the jurisdiction of the Secretary.

If we are at liberty to assume, from the recitals of the *affidavit*, that an application to purchase coal lands was being made, we must assume that it was being made to the *Register* and *Receiver* and not to anyone else.

DEMURRER.

The validity of this indictment was challenged on several grounds, which are set forth elaborately in the demurrer, but which we may summarize under the following heads:

(1) The indictment does not describe any offense denounced by any Federal statute.

(2) The allegations of said indictment are so deficient that the prosecution thereunder violates the sixth amendment to the Federal Constitution for the reason that it fails to inform the defendant of the nature and cause of the accusation against him.

(3) The said indictment is ambiguous, unintelligible and uncertain, because it is impossible to determine from it whether the defendant is charged with making, procuring to be made, or presenting a false affidavit or procuring it to be presented.

(4) That the prosecution is an attempt to deprive the defendant of his liberty and property without due process of law, because there is no Federal statute defining any such offense as is contained in this indictment.

(5) The said indictment does not set forth facts enough to show the subject matter.

(6) The said indictment does not set forth facts enough to show that any matter whatever was pending before or was within the jurisdiction of the Secretary of the Interior.

(7) That there is no allegation whatever that the papers were made or presented in connection with or in support of or relating to any matter, account or claim then pending before any officer.

(8) That it does appear that the papers were presented to the Register and Receiver of a local office, and not to the Secretary of the Interior.

(9) That is affirmatively appears that the papers did *not* relate to any pension or pension claim or claim to bounty lands.

(10) It is not alleged that the papers were forged or counterfeit, but simply that they contained false statements

(11) That there is no allegation of any "intent to defraud the United States."

(12) That, if it can be assumed that the papers were presented in relation to or in support of any pending matter or proceeding, there is no allegation that they contained any false statement as to any matter material to the right of purchase, or as to which any statement is required by law.

PRELIMINARY STATEMENT.

This case differs from all the others which were decided by the District Court and stands upon a distinct footing in at least these important particulars:

(a) Neither count of the indictment makes any attempt to charge a *conspiracy* under any statute; both counts charge precisely the same class and kind of acts, being simply the procuring to be made or presented or the presenting at a local United States Land Office of a "declaration in the form of a coal land affidavit at purchase," which paper is alleged to have been false in certain particulars.

(b) Neither count of the indictment shows that any matter was pending, or that any application was actually being made to purchase any land, or that any account of claim existed, or that there was any matter or proceeding for consideration or determination in connection with, or in relation to, or in support of which the paper was procured, made or presented.

(c) While alleging (as a conclusion of the pleader only) that the paper was to be and was presented to the Secretary of the Interior, the *facts* alleged show only a presentation and intention to present to the Register and Receiver of the local office and do not show that it ever reached or was intended to reach the Secretary.

It follows that in the consideration of this case we first eliminate all question as to the effect of section 5440 or any other conspiracy statutes.

But, on the other hand, if the case is to be considered on its merits, and if this court should not sustain the lower court in the other cases, it will still be necessary to examine this particular indictment with respect to the defects which we consider fatal in any event, and which, as we are advised, do not appear in the indictments in the other cases.

Because of these defects peculiar to this indictment and indicated under headings "b" and "c" above, and more particularly referred to hereafter, as well as because of the entire absence of the element of conspiracy, we have asked that this case be separately considered.

To state it in another way, so as not to be misunderstood, We are in cordial agreement with the contention that no offense is charged in any of these coal land indictments, but, whatever may be the determination of this court as to the general propositions, we confidently assert that an examination of *this particular indictment* will show it to be so utterly wanting in essential averments that it cannot be upheld under any view or any authority.

If these defects are, as we believe, fatal to the indictment, the action of the court below must be sustained in any event.

And the existence of these defects may properly be considered in connection with the question of the jurisdiction of

this court, which appears to us to be the question which confronts us at the very threshold of this case.

JURISDICTION OF THIS COURT.

The preliminary question arising in this case is whether this court has jurisdiction to review the action of the trial court sustaining the demurrer to the indictment.

It has no such jurisdiction unless it is given by the act of March 2, 1907—34 Stat. L., 1246, that portion material here being as follows:

"That a writ of error may be taken by or on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment or any count thereof, *where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.*"

The authority to review is given in such cases only as come within the classes mentioned in the portion of the statute which we have put in italics, and no jurisdiction is given this court unless the decision is "*based*" upon either the "*invalidity*" or the "*construction*" of the statute upon which the indictment is founded.

It will not be contended that the judgment in this case involved the invalidity of any statute, and unless it does appear that it was "*based*" upon the "construction" of the statute, no authority exists for the prosecution of this writ of error.

It is not enough that a question of construction of the statute was presented to the court below. It must, we think, appear affirmatively that such question was not only presented but that its decision was necessary to the determination of the cause and that it was the actual basis of the decision or that the judgment rendered could not have been given without de-

ciding it. In other words, such must have been the controlling question involved.

Missouri Pacific Ry. Co. vs. Fitzgerald, 160 U. S., 556-576.

Harrison vs. Morton, 171 U. S., 38-47.

Eustis vs. Bolles, 150 U. S., 361-366.

Carey vs. Houston, etc., Ry., 150 U. S., 170-181.

Cameson vs. U. S., 146 U. S., 533.

Shoshone Mining Co. vs. Rutton, 177 U. S., 505-509.

Ferry vs. King Co., 141 U. S., 668-673.

Giles vs. Teasley, 193 U. S., 146-169.

Sloan vs. U. S., 193 U. S., 614-620.

Caro vs. Davidson, 197 U. S., 197-200.

Empire, etc., Mining Co. vs. Hanley, 205 U. S., 225-233.

U. S. *ex rel.* Taylor vs. Taft, 203 U. S., 461.

Leathe vs. Thomas, 207 U. S., 93.

Arkansas Southern Ry. vs. German Nat. Bank, 207 U. S., 270.

We submit that the construction of the statute was not necessary to the judgment below, nor was it made, in fact, the ground of it.

The indictment purports to be drawn, and it was conceded in the argument below that it could only be sustained, under section 4746, R. S., being section 33 of the act of March 3, 1873, entitled, "An Act to Revise, Consolidate and Amend the Laws Relating to Pensions" (17 Stat. L., 566), as amended by the act of July 7, 1898. (30 Stat. L., 718). And the assignment of error in this court (Record, pages 20 and 21) limits the prosecution to the consideration of section 4746, R. S., U. S.

"That every person who knowingly or willfully (makes or aids or assists in the making or), in any wise, procures the making or presentation of any false or fraudulent affidavit, declaration, certificate, voucher or paper, or writing purporting to be such, concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions (or of the Secretary of the Interior), or who knowingly or willfully (makes or causes to be made, or aids or assists in the making, or) presents or causes to be presented at any pension agency any power of attorney or other paper required as a voucher in drawing a pension, which paper bears a date subsequent to that upon which it was actually signed or acknowledged (executed) (by the pensioner, and every person before whom any declaration, affidavit, voucher or other paper or writing to be used in aid of the prosecution of any claim for pension or bounty land or payment thereof purports to have been executed, who shall knowingly certify that the declarant, affiant, or witness named in such declaration, affidavit, voucher, or other paper or writing, personally appeared before him and was sworn thereto, or acknowledged the execution thereof, when, in fact, such declarant, affiant, or witness did not personally appear before him or was not sworn thereto, or did not acknowledge the execution thereof), shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term of not more than five years."

"The word 'acknowledged' was inserted in place of 'executed.'" Otherwise the amendments made in 1898 in parenthesis.

In the argument below many objections were urged to the indictment on the ground of lack of material and necessary averments to constitute a good charge of an offense under this or any other statute.

It was insisted that, while the indictment stated as a conclusion that "a paper in the form of an affidavit at purchase" pertaining to "a matter hereinafter described," was presented to the Secretary of the Interior, yet it nowhere thereafter or at all described or referred to any application, matter, account or claim pending anywhere to which the declaration presented pertained.

The reading of the indictment will show that this contention was well taken and the authorities hereinafter cited show,

we think, that this objection was fatal to the indictment and sufficient foundation for the judgment rendered.

But whether the courts holding upon this point was right or wrong, the objection was made and considered, and any error in the decision of that question is outside the statute authorizing review by writ of error.

So, also, it was argued, that while the indictment alleged, as a conclusion of the pleader merely, that the declaration filed pertained to a matter "within the jurisdiciton of the Secretary of the Interior," and that it was presented to him, yet the facts stated showed that it could not have been presented to the Secretary or have pertained to a matter within *his* jurisdiction.

The decision of these questions involved no question of the construction of the statute, but only a question as to what was in fact charged in the indictment.

Again, it was further urged that there was no charge in the indictment that the declaration was false in any *material matter*, even if it could be inferred therefrom that any matter was pending.

That the truth of the statements of the declaration as to all matters showing the qualifications of affiant and his right to make the entry was unchallenged.

These, and various other objections, sufficient, if well taken, to support the judgment of the court below, and involving only an examination and interpretation of the indictment istelf, were presented and urged and considered by the court.

It is apparent, we think, from the record that the decision of the court was, in fact, based upon such questions as these and not upon a construction of the statute.

It is true we also urged that the statute applied only to pension and kindred matters and that the court (in the Keitel case) said that this contention accorded with his own view; but, conceding that the question had been otherwise decided in other jurisdictions, the judge in these cases waived this objection and expressly placed his decision upon the other grounds not involving any question of construction or interpretation of the statute.

So far as affects the question of the jurisdiction of this court in this writ of error, it is immaterial whether these other questions were rightfully determined. If they were involved and, if well taken, would have been sufficient to sustain the judgment, then this case is taken out of the class in which a writ of error is allowed.

Further on we shall attempt to show that each of these objections was, in fact, well taken, but for the present purpose we need only contend that it does not appear that the decision complained of was *based* upon and *controlled* by the determination of any question of construction of the statute.

For this reason we think the writ of error cannot be presented in this case.

In passing upon the demurrer in this case the court referred to the opinion delivered in the "Keitel" case (No. 255, in this court), so that we may also go to that opinion to see what was then said upon these questions. In the abstract of that case, page 98, we find that after expressing his own concurrence in the contention that the statute applied only to pension and kindred matters, the court said:

"But inasmuch as two unreported cases from other districts have been called to my attention, in which my brothers appear to hold the contrary, and seem to take the view that the phrase 'or pertaining to any other matter' should be construed to cover all subject-matters within the jurisdiction of either the commissioner or secretary, I waive my views in that particular here."

Proceeding, then to consider the indictment and the facts charged therein, the court holds that it appears from the indictment itself that the matters charged were not within the jurisdiction of the Secretary; also, that the indictment did not charge that the declaration was false in any matter appearing to be material or required to be stated.

Surely the determination as to these matters was controlled by the language of the indictment and not by any "construction" of the statute.

In this connection, it may be proper to call attention to the fact that the right to writ of error is not given to cases

involving the mere *interpretation* of the statute. It is only given where the decision is based upon the "*construction*" of the statute upon which the indictment is founded.

We do not understand the two words to mean the same thing.

"Interpretation" has been said to be the "finding of the true sense of the special form of words used," and "construction" to be "the drawing of conclusions respecting subjects that lie beyond the direct expression of the text."

The courts have distinguished between the two substantially as above defined.

Bloomer vs. Todd, 3 Wash. Ter., 612; 19th Pac., 135-138.

Prop. Morris Aqueduct vs. Jones, 36 N. J. Law, 206-209.

State vs. Smith, 35 Neb., 13-22.

People vs. Commissioners, 95 N. Y., 554-559.

Deane vs. State, 159 Ind., 313-316.

Terre Haute, etc., Ry. vs. Erdel, 158 Ind., 344-347.

There are no common law offenses against the United States and every indictment must, therefore, be founded upon a statute.

Todd vs. U. S., 158 U. S., 278.

U. S. vs. Eaton, 144 U. S., 677.

It follows that in every case where the sufficienecy of an indictment is questioned, the court is called upon to determine whether it charges an offense under some statute.

This means, always, that both the statute and the indictment must be examined and the court must determine whether the facts stated constitute an offense which is included within the statute.

If this, of itself, constitutes "construction" of the statute, every case in which an indictment is held deficient could be brought here by writ of error. But if congress had intended that all such cases could be so reviewed, would it not have en-

acted a simple general provision covering all cases, instead of adopting the language used?

There is no room for "construction"—in its true sense—when the statute is plain and unambiguous.

"Where there is no ambiguity in the words, there is no room for construction."

United States vs. Wiltberger, 5 Wheat., 76-96.

See, also,

Thornley vs. United States, 113 U. S., 310.

St. Paul, etc., Ry. vs. Phelps, 137 U. S., 528.

United States vs. Alger, 152 U. S., 384.

Whether the coal land act contains any express prohibition against alienation, and whether it requires the "declaration" set out in this indictment, are questions which can be determined by a mere inspection of its terms. No construction of ambiguous words is required.

While the indictment charged (as a mere conclusion), that the affidavit was presented to the Secretary of the Interior, it was conceded by a counsel for the government on argument in the District Court that it was not, in fact, presented to that officer, but was filed in the Land Office in Durango, where it still remains. (Record, page 18.)

In view of this concession, the court thought it not necessary to do more than to refer to his opinion on the second count in the Keitel case for the reasons upon which the demurrer was sustained.

Turning to that opinion (Record, U. S. vs. Keitel, pages 97 to 100), we think the following points will cover all that was decided:

(A) Section 4746 is applicable only to pension and kindred matter.

(B) The facts stated in the indictment were held to show that the papers were presented to the Register and Receiver of the Land Office and not to the Secretary of the Interior, and to show that no matter was pending over which the Secretary of the Interior had jurisdiction within the meaning of the statute.

(C) That under the circumstances disclosed by the indictment, the coal land act does not require the papers com-

plained of and that the indictment did not negative the qualifications of the entryman or the statement that he had not theretofore exercised his right.

(D) That a criminal offense could not be based on a mere departmental regulation, but is necesarily an act committed or omitted in violation of a law prohibiting or commanding it.

Certainly, in view of the numerous questions raised by the demurrer on the ground of defects in the indictment specifically pointed out and not involving any question of construction of any statute, we are justified in insisting that the decision in this case does not appear to have been based upon or controlled by the construction of the statute upon which the indictment was founded.

WHEREIN THIS CASE DIFFERS FROM THE OTHERS PENDING IN THIS COURT.

If it be determined that the court has jurisdiction of this writ of error, we come to the question whether the indictment is subject to any of the objections made to it, for if any one of them is well taken the judgment ought to be affirmed.

So far as we are advised, this case stands on an entirely distinct and different footing from any other one now pending.

There is no charge or attempt to charge conspiracy. It is not alleged, as in the second count in the Keitel case, that there was any conspiracy to commit the offense of making or presenting a false paper, but the substantive and only offense attempted to be charged is the procuring or presenting of a paper, *admittedly genuine*, but alleged to have contained false matter.

There is no allegation of "intent to defraud the United States;" the tenor and language of the indictment differs radically from the others, and, as we believe, there is an utter lack of any averments which are essential to a good indictment, whether this court accepts or rejects the contentions made in the Keitel, Forrester and other cases.

It is true that if the court should hold that no criminal offense can be based upon a mere land office regulation, not required or authorized by statute, or that the alleged false matter was immaterial, or that section 4746 applies only to pension and kindred matters, the judgment in this case must be affirmed. But, whatever conclusion is reached in the other cases, we insist this judgment was right, for the following reasons, which, so far as we are advised, are peculiar to this case.

This particular indictment nowhere, we contend, sufficiently charges any of these essential matters:

(a) That any application, account, claim, demand or proceeding was anywhere pending in relation to or in support of or in connection with which the declarations were procured or presented.

(b) That there was any matter within the jurisdiction of the Secretary of the Interior to which such declarations related.

(c) That the declarations were procured or presented "with intent to defraud the United States."

(d) To identify or describe any proceeding, account, claim, application or land, or to identify or show any subject-matter to which the declarations related.

(e) That the declarations were forged or counterfeit (which allegation is essential if any other statute than section 4746 be relied on to uphold the indictment).

These objections, as we understand it, are ~~similar~~ peculiar to this case and will require a discussion of this particular indictment, and we will take them up first, turning later to the questions common to the other cases.

The indictment contains no direct allegation that anything was any where pending to which the declarations related.

While the indictment is in two counts, yet each count attempts to charge the same kind of offense, and the language of the charging part of the indictment is the same in each count. Following the formal part, the indictment proceeds as follows:

"That one Charles E. Herr, late of Durango, in the said district, on the thirty-first day of January, in the year of our Lord nineteen hundred and six, at the said city of Durango, in the said District of Colorado, did unlawfully, knowingly and willfully by solicitation and inducement, procure one Florence Garman to make and subscribe and present to the Secretary of the Interior of the said United States by and through the Register and Receiver of the United States Land Office at Durango, Colorado, and she, the said Florence Garman, did, in pursuance of such solicitation and inducement, thereupon, on said thirty-first day of January, nineteen hundred and six, make and subscribe, and present to the said Secretary of the Interior, by and through the said Register and Receiver of the said United States Land Office at Durango, Colorado, by and through her said agent and attorney in fact, Charles E. Herr, a certain false and fraudulent declaration in the form of an affidavit at purchase, pertaining to a certain matter hereinafter described, which was then and there a matter within the jurisdiction of the said Secretary of the Interior; that is to say, a declaration in the form of a coal land affidavit at purchase, of her, the said Florence Garman, partly written and party printed, of the tenor which here follows:"

And thereupon sets out the declaration referred to *In hace verba*. The indictment then proceeds as follows:

"Which said declaration then and there contained, amongst other things, certain statements material to said matter within the jurisdiction of said Secretary; that is to say:—"

Then follows the reference to the various statements contained in the affidavit, after which the indictment proceeds:

"The said statements in the said declaration then and there being material in the matter aforesaid in this, that it was necessary, in order to the due administration of the said laws by them, the said Secretary of the Interior and the said Register and Receiver of said Land Office should thereby be truly informed whether or not the said Florence Garman was then and there claiming said land above described under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States and under coal land declaratory statement number seven hundred and fifty-six, filed in the land office at Durango, aforesaid, on the eighth day of November, nineteen hundred and five, by her, the said Florence

Garman, by and through Charles E. Herr, her attorney in fact, the preference right of purchase to the lands first above described, whether or not she, the said Florence Garman, never had the right of purchase under the aforesaid provisions of law either as an individual or as a member of an association, and whether or not she had never held any other lands under its provisions, and whether or not she, the said Florence Garman, and her grantor had expended in developing coal mines on said tract in labor and improvements, the sum of fifty dollars, the nature of said improvements being as follows: Surveying, prospecting and an open cut uncovering a vein of coal, and that she had caused to be located and opened a mine of coal on said land, and whether or not she, the said Florence Garman, was then and there in the actual possession of the said mines, and made the entry for her own use and benefit, and not directly or indirectly for the use and benefit of any other party; and which said declaration then and there, as he, the said Charles E. Herr, then and there well knew, was a false and fraudulent declaration, and one containing false and fraudulent statements material to the matter aforesaid in this: That she, the said Florence Garman, and her grantor, when and where she so made, subscribed and presented the said declaration as aforesaid, had not expended in developing coal mines on said tract of land, in labor and improvements, the sum of fifty dollars, or any other sum, and in this, that she, the said Florence Garman, had not caused to be located and opened a mine of coal on said land, and in this, that she, the said Florence Garman, was not then and there in the actual possession of the said mines, and in this that she, the said Florence Garman, did not then and there make the said entry for her own use and benefit, but in truth and in fact was then and there making said entry for the use and benefit of other parties, to-wit: Charles E. Herr, George C. Franklin and other parties to the grand jurors unknown; and the grand jurors aforesaid, upon their oaths aforesaid, do further present that the land first above described in this count of this indictment was then and there coal land of the said United States, open to purchase and entry as coal land.

"And the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Charles E. Herr, at the time and place and in manner and form aforesaid, unlawfully, knowingly and willfully did procure the making, subscribing and presenting of a false and fraudulent declaration in the form of an affidavit at purchase pertaining to a matter within the jurisdiction of the said Secretary of the Interior, against the peace and

dignity of the said United States, and contrary to the form of the statute of the same, in such case made and provided."

The declaration or affidavit set out in the indictment recites that affiant as a single woman, giving her residence, and claiming under the provisions of the coal land laws and under Coal Declaratory Statement No. 756, the preference right of purchase to "the W. ½ of S. E. ¼ of section 18, and W. ½ of N. E. ¼ of section 19, in Township 35, N. of Range 10, W. of the N. P. M., subject to sale at the land office at Durango, Colorado," does solemnly swear, etc.

Neither the affidavit nor the indictment anywhere contains any description of any land or any reference to any claim or application, except as above mentioned and as above described.

It will be noticed that the indictment alleges that a "declaration in the form of an affidavit at purchase, pertaining to a matter *hereinafter described*," was presented, and follows this allegation with a copy of the alleged declaration.

It then says the declaration contained statements "*material* to *said matter*," setting out the statements claimed to be material and charging certain of them to be false.

It then alleges that "the land first above described" was coal land, subject to entry and purchase as such, and charges that defendant procured the affidavit to be presented "pertaining to *a matter* within the jurisdiction of the said Secretary of the Interior."

Nowhere, outside of the alleged "declaration" itself, is there any descriptions of any lands, and nowhere is it alleged that any land was *purchased or attempted to be purchased*, or that *any action whatever* was asked or taken, at the Land Office or elsewhere, upon the "declaration" or any other matter. Nowhere is it charged that the defendant, the affiant, or any one else had made or contemplated making an application to purchase the land mentioned in the declaration, or any land, or that the approval of any entry, account or claim was being sought by anybody.

The pleader seemed to recognize that it was necessary to show that some matter was pending and to describe it so that defendant and the court might be informed, for he starts with

the allegation of the conclusion that the declaration pertained to "*a certain matter hereinafter described,* which was then and there a matter within the jurisdiction of the said Secretary of the Interior," but he wholly fails thereafter to describe the matter, or tell what it was, or how pending, or how within the Secretary's jurisdiction.

This omission was probably the result of oversight, but it is none the less fatal to the indictment.

It hardly needs argument or authority to show that a criminal charge can not be based upon the mere making or filing of any sort of paper which might contain a false statement, unless such paper or statement has some connection with or pertains to something upon which some sort of action is asked or taken.

If the pleader had said that there was then and there pending an application, then or theretofore made by the affiant or some one else, upon which some action was being asked or proposed to be taken, he would still, we think, have been required to show the nature of the application and show how and where it was pending, so that the court and the defendant might know what it was and whether within the jurisdiction of the Secretary.

But he nowhere alleges that anything was anywhere pending, unless the allegation "pertaining to a matter hereinafter described, which was then and there a matter within the jurisdiction of the said Secretary of the Interior," is sufficient for that purpose.

In U. S. vs. Hess, 124 U. S., 486, this court said:

"No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital."

See, also,

Pettibone vs. U. S., 148 U. S., 197.
U. S. vs. Carll, 105 U. S., 611.
U. S. vs. Peuschel, 116 Fed., 642.
Moline vs. State, 93 N. W., 228.
State vs. Mitchell, 35 S. E., 845.

Even if there was a charge of intent to defraud the United States, a direct charge that the paper pertained to some pending matter would be necessary. Much more is it necessary when this charge is wholly wanting.

U. S. vs. Kessell, 62 Fed., 59.
U. S. vs. Cameron, 13 N. W., 561.
U. S. vs. Glassner, 81 Fed., 566.
U. S. vs. Van Louven, 62 Fed., 69.
U. S. vs. Ambrose, 2 Fed., 764.
U. S. vs. Miskell, 15 Fed., 369.
U. S. vs. Reichert, 32 Fed., 142.
U. S. vs. Wallace, 40 Fed., 114-147.
U. S. vs. Green, 115 Fed., 343, 356.
Staton vs. U. S., 88 Fed., 253.
Cross vs. N. C., 132 U. S., 131.

There is no presumption or intendment in favor of the jurisdiction of an inferior court or officer exercising special statutory powers, and their jurisdiction must affirmatively appear.

Cooley's Constitutional Law, page 508.
12 Ency. Pl. and Pr., 176.

It is elementary that neither the affidavit nor any of its recitals constitute any part of the charging part of the indictment, nor can they be looked to to supply the omission of essential elements of the charge.

If, however, we look to the affidavit, we find that it could not invoke the jurisdiction of either the Secretary or the local officers as an application to purchase.

If a party wants to purchase coal lands it is not enough to show simply that he is qualified to do so. He must make "*application to the Register*," and also pay or tender to the Receiver the purchase price. The form of application furnished by the department is as follows:

CASH APPLICATION.

Land Office at .....

No..... .....

I, ..., of ..... County, do hereby apply to purchase the .....of Section ....., in Township ....., of Range ....., containing ..... acres, according to the returns of the Surveyor-General, for which I have agreed with the Register to give at the rate of ..... per acre.

.....

My postoffice address is .....

I, ..., Register of the land office at ....., do hereby certify that the lot above described contains ..... acres, as mentioned above, and that the price agreed upon is ..... per acre.

It is nowhere charged that any such steps were taken or contemplated or that the declaration was used or intended to be used in support of such application.

And it is only in connection with such application that any showing of qualifications to enter is required.

We submit that under the authorities heretofore cited it is necessary to charge directly, and not inferentially or by way of recital, that an application to purchase was made or pending to which the declaration referred, and to sufficiently identify and describe such matter; and we confidently assert that the indictment wholly lacks this essential averment.

If the "declaration" may be examined to aid the charge of the indictment, there is still no sufficient description of the subject-matter, and no sufficient description of the land.

As we have seen, there is nowhere, outside of the "declaration" alleged to have been presented, any mention of any claim or application for land, nor any attempted description of any land.

The description in the recital of the declaration is, as heretofore set out, as follows:

"W. ½, S. E. ¼ of section 18, and W. ½ of N. E. ¼ of section 19, in Township 35, N. of Range 10, W. of the N. M. P. M."

The decision of Mr. Justice Field in the case of U. S. vs. Riebhert, 32 Fed., 142-147, a case where the property in relation to which a false survey was alleged to have been presented is described in the same manner, is in point.

"The language should therefore be so plain that one of ordinary intelligence can understand its meaning. For that purpose common words are to be used as descriptive of the matter. Abbreviations of words employed by men of science or in the arts will not answer, without full explanation of their meaning in ordinary language. The use of the initials A. D., to indicate the year of our Lord, is an exception, because of its universality. Arabic figures and Roman letters have also become indicative of numbers as fully as words written out could be. They are of general use as to be known of all men. They therefore may be employed in indictments. But the initials here have reference to the public lands as marked on the public surveys; they are signs used in a particular department of public business, and are not matters of general and universal knowledge by all speakers of the English language."

But, in any event, there is no direct statement or showing, even in the declaration, that anything was pending to invoke the jurisdiction of the Land Office, as to the land mentioned, even if the description should be held to be sufficient.

WAS ANY MATTER PENDING "WITHIN THE JURISDICTION OF THE SECRETARY OF THE INTERIOR?"

If it can be said that it appears that any matter was pending to which the "declaration" pertained, it is apparent that such proceeding was before and within the jurisdiction of the local officers and not of the Secretary of the Interior.

The Register and Receiver are not subordinate officers to the Secretary in the sense that they act for him or perform duties incumbent on him or his office.

Applications for public lands are made in the first instance to and are acted upon by the Register and Receiver. In some cases their action is final, in others there may be an appeal, first to the Commissioner of the General Land Office and from *his* ruling to the Secretary.

But no authority exists for presentation to or action by the Secretary upon an application to purchase coal lands. Such application *must* be made to the *Register*.

R. S., U. S., section 2347.

The offices of Register and Receiver are created by law.

R. S., U. S., section 2234.

The officers are appointed for a term of four years.

R. S., U. S., section 2244.

They are required to give bond and to reside at the place of location of their office.

R. S., U. S., sections 2235 and 2236.

They are authorized to administer oaths "in connection with the entry or purchase of any tract of public lands."

R. S., U. S., section 2246.

The application to enter lands is made to the Register, and a penalty is prescribed if *he*, knowingly and falsely, *"refuses to permit the person so applying to enter the same."*

R. S., U. S., section 2247.

Pre-emption claimants were authorized to "enter with the Register of the Land Office" 160 acres, upon payment of the minimum price.

R. S., U. S., section 2259.

Proof in such cases was to be made "to the satisfaction of the Register and Receiver."

R. S., U. S., section 2263.

Sections 2264 and 2267 show that all proceedings are to be had before the Register and Receiver, "and all questions as to the right of pre-emption arising between different settlers shall be determined *by the Register and Receiver* of the district within which the land is situated; and *appeals* from the decision of the district officers, in case of contest for the right of pre-emption, shall be made to the *Commissioner of the General Land Office, whose decision shall be final*, unless *appeal* therefrom be taken to the Secretary of the Interior."

R. S., U. S., section 2273.

In homestead applications the application is made *to* and the affidavits filed *with* the Register and Receiver and payment made to that office, and the applicant "shall *thereupon be permitted to enter the amount of land specified.*"

R. S., U. S., section 2290.

Such entries may be canceled when abandonment thereof is proved "to the satisfaction of the *Register.*"

R. S., U. S., section 2297.

Timber culture entries are allowed or rejected by the Register, and may be canceled when it is proved "to the satisfaction of the Register" that the claimant has failed to comply with the law.

R. S., U. S., sections 2465 and 2467.

The President of the United States, not the Secretary of the Interior, shall cause patents to issue for entries made.

R. S., U. S., section 2483.

R. S., U. S., sections 450 and 451.

The office of Commissioner of the General Land Office is created by statute.

R. S., U. S., section 446.

All returns relative to the public lands shall be made to the Commissioner of the General Land Office.

R. S., U. S., section 456.

Applications under the Coal Land Act must be made to the Register, and the right to enter arises only upon such application.

R. S., U. S., section 2347.

And the "*Commissioner of the General Land Office*," not the Secretary of the Interior, is authorized to issue the rules and regulations to carry that act into effect.

R. S., U. S., section 2351.

The department itself has construed sections 441 and 2273, above cited, as providing for appeals on "any question relating to the disposal of public land," except interlocutory orders, "or other matters resting in the sound discretion of the Commissioner," from the Register and Receiver to the Commissioner, and again from the Commissioner to the Secretary, but fully recognizes the authority and jurisdiction of the Register and Receiver and the Commissioner, unless and until such appeal is taken; and the judicial or quasi-judicial character of these officers is fully recognized both by the statutes and the rules of the department.

Circular, General Land Office, 1904, pages 86, 87, 88.

Rules of Practice, numbers 2, 4, 5, 36, 51, 76, 80, 43, 81, etc.

And the Register and Receiver, in the first instance, passes upon and determines the character of the land applied for, and whether it is subject to entry.

See, also,

Sections 100 and 101, Mining Circular, December 18, 1903.

When we look at the case of a rejected or refused application for any land, we find that the decision of the Register of the local office is, under the rules of the department, *absolutely final*, unless an appeal is taken therefrom; and the application itself forever remains in the local office, and does not pass into

the office of either the Commissioner or the Secretary, except only in cases of appeal.

Assuming, for this argument only, that an application to enter can be inferred; suppose the application had been rejected by the Register, under the specific authority given him by statute and rules of the department to pass upon it, and that no appeal had been taken from this decision, the papers presented with the application in such case would still remain in the local office, would never be forwarded to the General Land Office, and no question upon them would ever come up before either the Commissioner of the General Land Office or the Secretary of the Interior.

Furthermore, in actual practice, very few of the many papers filed, and applications made to the local land offices, ever reach the Secretary.

Ordinarily, where entries are allowed by the local office, the papers are transmitted to the General Land Office (not to the Secretary of the Interior), and are never seen by, or referred to, the Secretary for any purpose.

Some few of the cases passed upon by the Commissioner do reach the Secretary on appeal from the Commissioner's decision, but these are exceptional cases, and are a very small part of the whole business transacted by the General Land Office.

As we have seen, in cases of the rejection of an application, no question is ever presented to the Commissioner, nor are the papers transmitted to him, except in cases of appeal. Under the statute and rules, the local office undoubtedly has jurisdiction to pass upon the application in the first instance.

Nowhere in the law do we find authority given to the Secretary of the Interior to pass upon an application presented at the local land office, and, in the first instance, to determine whether or not that application shall be allowed or be rejected. The authority and the jurisdiction to determine these matters in the first instance is vested in the local officers, and their appointment is provided for, as we have seen, by the statute itself. They are not mere employes of the Secretary, acting for him in his name, but act under statutory authority specially vested in them.

The statements of the indictment that the affidavits were intended to be presented, and were presented, to the Secretary of the Interior, by and through the Register and Receiver of the Land Office of Durango, are not controlling and are mere conclusions and are contradicted by the facts showing that the affidavits were intended to be, and were, presented at the *local* office, and by the admissions referred to by the District Court in its opinion. It can not be said that they were presented to the Secretary, because, under a possible state of circumstances, they might eventually be presented to the Secretary, when, in truth, and in fact, and according to the usual course of proceedings in the Land Office, they would, ordinarily, never reach the Secretary or his office at all.

If made in connection with an application, they could not, under the rules, reach his office, or even the office of the Commissioner, if the application were rejected by the local officers, and there is nothing in the indictment to show whether or not the application, if made, was allowed, or whether it was rejected and refused by the local officers; or that any appeal was prosecuted from the rejection, if rejected.

The statute (section 4746, as amended) denounces the making, procuring and presenting of a false or fraudulent declaration *only* when it pertains to a matter "*within the jurisdiction* of the Commissioner of Pensions or of the Secretary of the Interior."

The word "jurisdiction" is certainly used in its legal sense, meaning authority to hear and determine, and, if we can by any means infer that the "declaration" pertained to a pending application to purchase coal lands, or that it was such application, it is quite apparent that the matter was *then* within the exclusive jurisdiction of the local office; and there is absolutely nothing, either by way of charge or recital, to show that it ever did or could pass to or come within the jurisdiction of the Secretary.

The indictment does say, as a mere legal conclusion, unsupported by any primary facts, that the declaration pertained to a matter within the jurisdiction of the Secretary; but such averment is of no legal effect and especially is it unavailing when the *facts* alleged show that, under the law, the matter, if

pending at all, must have been within the then exclusive jurisdiction of other officers.

Other questions, which probably have been or will be discussed in the other cases, remain to be considered. They may be stated thus:

1. Does section 4746, on which this indictment is based, apply to such matters as here disclosed, or is it limited to pension and kindred matters?

2. Conceding (for this purpose only) that the declaration pertained to an application to purchase coal lands, are any of the statements alleged to be false material to such matter? The alleged false statements not being required or provided for by any statute, and not affecting the right or qualification of the declarant to purchase, as such rights and qualifications are defined by statute.

3. If immaterial to the exercise of the right, can a prosecution be based upon the alleged falsity of any such statement?

SECTION 4746 RELATES ONLY TO PENSION MATTERS.

In cases of doubt the title and subject of the act may always be resorted to to determine the meaning of the body of the act.

Meyer vs. Western Car Co., 12 Otto, 1
Rector vs. U. S., 142 U. S., 457.

The original section is section 33 of the act of March the 3d, 1873, entitled, "An Act to Revise, Consolidate and Amend the Laws Relating to Pensions." (17 Stat. L., 566-575.)

This section was amended to read as above by the act of July 7, 1898. (Chapter 578, 30 Stat. L., 718.)

The title of the original act makes it clear that it related solely to pensions. The title to the amendment being simply to change it so as to read as now written would be proof that it still relates to pension matters. An amended statute must show clearly that it was to embrace a wide scope before courts can give it such a large interpretation.

Let us analyze the statute and see what subjects are embraced within it. Referring to this statute, we observe that it specifically mentions "any claim for pension," or the "payment thereof," and "bounty lands." It also specifically mentions the Commissioner of Pensions, the officer at the head of the bureau having control of these claims. It does not mention any other specific class of claims or any other bureau or sub-division of the Department of the Interior.

If we hold the statute to apply to the case shown in the indictment, we would have to hold that it not only passed up from the Commissioner of Pensions to the higher office of Secretary of the Interior, and included all matters in his office, but also passed again downward through all the various branches and bureaus and offices of that department, such as the census bureau, Indian service, reclamation service and other matters which cannot possibly be comprehended within the meaning of the terms and phrases used in the act. Much of the business of those departments, bureaus and agencies being entirely foreign to any business of the office of Commissioner of Pensions, or to any matter relating to or connected with pensions or their payment, or bounty lands.

We will now consider the statute in regard to some of its terms.

The amended act specifically enumerates "pension claims" and the "payment thereof," and the "Commissioner of Pensions," but does not specifically mention any other branch of the Department of the Interior.

The original statute applied only to pension matters and was further restricted to the proceedings in these matters while pending before, and within the jurisdiction of, the Commissioner of Pensions himself. It did not impose a penalty upon the person who himself prepared a false affidavit, but only upon the one who procured it to be done; nor did it cover, under the first clause, any paper other than an affidavit; nor did it cover a case where, on appeal from the Commissioner of Pensions, a false affidavit was procured to be presented to the Secretary of the Interior.

U. S. vs. Kuentzler, 74 Fed., 220.

Edgington vs. U. S., 164 U. S., 361; 17 S. C. E., 72.

It would seem that the purpose of the amendment was to cover the making, as well as the procuring, of any false paper in pension matters, including bounty lands, whether the matter was pending before the Commissioner or the Secretary, and not to extend the statute to entirely different matters under the jurisdiction of other officers.

"The amendment of 1898 is plainly of a very special character," and broadens the original act "only to a very limited extent."

Pooler vs. U. S., 127 Fed., 509-513 (C. C. A., 1 Cir.)

The Commissioner of Pensions is in the Department of the Interior, and performs his duty under the direction of the Secretary.

R. S. U. S., sections 470, 471.

Rule 1 of Practice, relating to pension claims, provides for an appeal to the Secretary of the Interior from the final action of the Commissioner of Pensions, "in all cases relating to pensions."

Under Rule 3, new evidence may be filed after the case has gone to the Secretary.

It is thus apparent that any pension case may, at some stage of the proceeding, be brought directly within the jurisdiction of the Secretary of the Interior, and be taken out of the jurisdiction of the Commissioner.

When we remember that the old statute covered only certain offenses in pension matters, and applies only to a restricted class of persons, at particular stages only of the proceedings, it is not unreasonable to suppose, unless the language of the amendment necessarily repels the presumption, that congress intended only to extend the provisions of the section to persons who made, as well as those who procured, any material false paper in a pension matter, at any stage of the proceeding.

"It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and from the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language

would extend to cases which the legislature never designated to embrace in it."

Brewer vs. Blougher, 14 Pet., 178.

Petri vs. The Bank, 12 S. C. R., 325-327; 142 U. S., 644.

See, also,

Cherokee Intermarriage cases, 203 U. S., 76, 89.

"It is true that, if the language used in that last clause be given its widest and broadest application, it would include all owners of real estate which had been sold in any portion of the country under the provisions of the direct tax act. But we think a perusal of the whole act prevents our giving this unlimited construction, because to do so would conflict with what we think was the intention of Congress, gathered from the provisions of the whole act. Under such circumstances it is not only the right, but it is *the plain duty*, of the court to limit, by a proper construction, the otherwise boundless application of the general language used in the statutes."

McKee vs. U. S., 17 S. C. R., 92-95; 164 U. S., 287.

What has frequently been called the "celebrated rule" of construction, applicable to this statute, has been thus stated:

"When a particular class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class."

Broom Leg. Max., 625.

"When there are general words following particular and specific words, the former must be confined to things of the same kind."

Sutherland Stat. Con., section 268.

"Where general words follow particular words, the rule is to construe the former as applicable to things or persons particularly mentioned."

Sedgwick Con. Stat., page 361.

"When specific and general terms in a statute are mingled the meaning of the whole is, in various circumstances, less broad than if the general were employed alone. Or, in the

words of Lord Bacon, 'As exceptions strengthen the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated.' The more common form of this constitutes what has been termed the 'celebrated rule;' that

"'Doctrine defined—Where particular words of a statute are followed by general—as if, after the enumeration of classes of persons or things, it is added, "and all others"—the general words are restricted in meaning to objects of the like kind with those specified.'"

Bishop, Statutory Crimes, section 245, page 261.

See, also, the following authorities fully supporting this proposition:

Sarlls vs. U. S., 152 U. S., 570.

U. S. vs. Irwin, 5 McLean, 178.

U. S. vs. Caldwell, 19 Wallace, 264.

U. S. vs. Beach, 71 Fed., 160.

State vs. Bryant, 90 Mo., 534; 2 S. W., 836.

State vs. Schuchmann, 133 Mo., 111; 33 S. W., 35.

State vs. Fry, 186 Mo., 198; 85 S. W., 328.

Wheeler vs. N. Col. I. C., 9 Colo., 248.

Hoover vs. People, 17 Colo. App., 375-387.

Morris vs. Anderson, 16 Colo. App., 449.

Troy, Etc., Co. vs. Denver, 11 Colo. App., 368.

Brooks vs. Cooke, 44 Mich., 617.

Moore vs. Settle, 82 Ky., 187.

State vs. Sumner, 10 Vt., 587.

Edson vs. Hayden, 20 Wis., 682.

American, Etc., Co. vs. Virginia, Etc., Co., 91 Va., 272; 21 S. E., 466.

State vs. Goodrich, 54 N. W., 577.

Shirk vs. People, 121 Ill., 61; 11 N. E., 888.

State vs. Fontenot, 36 So., 630-634.

People vs. The Railway Co., 84 N. Y., 565-569.

Bevitt vs. Crandall, 19 Wis., 581-583.

26 Enc. of Law (2d Ed.), 609-610.

THE INDICTMENT CAN NOT BE SUSTAINED UNDER ANY STATUTE OTHER THAN SECTION 4746.

It was not contended in the argument below that the indictment could be sustained under any other statute, and it was conceded, as we understand, that if it was not good under section 4746, as amended, it must fall.

But, without conceding that any other statute may be looked to, we think it is clear that it is not to be sustained under any other statute for the following reasons:

1. Sections 5418, 5479, and the first two clauses of section 5421, are forgery statutes, pure and simple, and have no application to a genuine instrument containing false statements.

U. S. vs. Staats, 8 How., 41.

U. S. vs. Wentworth, 11 Fed., 52-55.

U. S. vs. Cameron, 13 N. W., 561-564-565.

U. S. vs. Albert, 45 Fed., 552.

U. S. vs. Houghton, 14 Fed., 544.

Staton vs. U. S., 88 Fed., 253.

U. S. vs. Moore, 60 Fed., 738.

2. Intent to defraud the United States is a necessary element under all of these sections, and must be directly alleged.

Staton vs. U. S., 88 Fed., 253; C. C. A., 8th Cir.

Cross vs. North Carolina, 132 U. S., 131.

U. S. vs. Wentworth, 11 Fed., 52.

3. Under all these sections there must be a direct allegation that the document pertains to some pending matter.

U. S. vs. Kessell, 62 Fed., 59.

U. S. vs. Cameron, 13 N. W., 561.

None of these allegation are to be found in this indictment.

THE COAL LAND ACT DOES NOT REQUIRE ANY OF THE STATEMENTS COMPLAINED OF, AND AUTHORITY GIVEN THE COMMISSIONER TO MAKE "ALL NEEDFUL RULES AND REGULATIONS FOR CARRYING

INTO EFFECT" ITS PROVISIONS DOES NOT EMPOWER HIM TO IMPOSE RESTRAINTS UPON OR TO LIMIT THE RIGHT OF PURCHASE EXCEPT AS SUCH RESTRAINT AND LIMITATION IS CONTAINED IN THE ACT ITSELF.

To facilitate examination of the Coal Land Act we set it out in full, as follows:

"Sec. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the Register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States, not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the Receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

"Sec 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

"Sec. 2349. All claims under the preceding section must be presented to the Register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office, and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expira-

tion of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

"Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims, and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

"Sec. 2351. In case of conflicting claims upon coal lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

"Sec. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver or copper."

The qualifications of an individual entryman under this act are found in the first section, which says that:

"*Every person* above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, * * * shall, upon application to the Register of the proper land office, *have the right to enter*," etc.

There are no *prohibitions*, as we take it, in the act. The *limitations* are as to quantity that may be taken and number of *entries* that may be made by the same person.

It would seem that congress did not consider that any limitation, as to the number of entries that might be made by the same person, was made or implied in the first three sections, for in the fourth section we find the limitation inserted expressly and made applicable to the other sections.

The *grant* of right to make one entry is to "every person" who is a citizen (or has declared his intention to become such) and is more than twenty-one years old. No other qualification is required. There is no prohibition against alienation, no requirement that the entryman shall make any showing whatever as to his object, purpose or intention in making the entry, and no authority given the Commissioner to make any rules or regulations except for "carrying into effect" the provisions of the act.

Authority to carry the act into effect does not empower the Commissioner to impose additional conditions or restrictions.

This court has said:

"But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authenitative and final construction to the statute. This, we think, is beyond his power. * * * If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

U. S. vs. United Verde Co., 196 U. S., 207; 25 Sup., St. 222-225.

And, again:

"True it is that in the concluding portion of Sec. 3 of the timber and stone act it is provided that 'effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.' But this power must, in the nature of things, be construed as authorizing the Commissioner of the General Land Office to adopt

rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred. As, then, there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit, and had full power to dispose, *ad interim*, of his claim upon the final issue of patent, we think the motive of the applicant was irrelevant."

Williamson vs. U. S., 207 U. S., 425; 28 Sup. Ct., 163-177.

See, also,

Adams vs. Church, 193 U. S., 510-517.

U. S. vs. Eaton, 144 U. S., 677.

Morrill vs. Jones, 106 U. S., 467.

U. S. vs. Mathews, 146 Fed., 306.

U. S. vs. Maid., 116 Fed., 650.

U. S. vs. Blasingame, 116 Fed., 654.

U. S., vs. Manion, 44 Fed., 800.

U. S. vs. Bedgood, 49 Fed., 54-59.

These cases support the proposition that the Commissioner has no power to require such an affidavit as the one set out, and also the further proposition that a criminal prosecution cannot be based thereon.

There is also a long line of cases holding that restraints upon alienation are not favored and, in the absence of an express prohibition in the statute, contracts of sale, though made before the title is acquired, are not illegal, immoral or void.

Lamb vs. Davenport, 18 Wall., 307.

Webster vs. Luther, 163 U. S., 331.

French vs. Spencer, 62 U. S., 228.

Marks vs. Dixon, 31 U. S., 501.

Stark vs. Starr, 94 U. S., 477.

Barney vs. Dolph, 97 U. S., 652.

Hussey vs. Smith, 99 U. S., 20.

Hartman vs. Butterfield Lumber Co., 199 U. S., 335.
Lipscomb vs. Nichols, 6 Colo., 290.
Arnold vs. Christy, 4 Ariz., 19; 33 Pac., 619.
Watkins Land Co. vs. Creps, 83 Pac., 969—Kansas.
Rose vs. Lumber Co., 73 Cal., 385; 15 Pac. 19.
Mintague vs. Carroll, 36 Pac., 50—Utah.
McKinnon vs. Winn, 33 Pac., 582—Oklahoma.
Sutherland vs. Whittington, 46 Ark., 285.
Snow vs. Flannery, 10 Iowa, 318.
Fiedler vs. Norton, 30 N. W., 128—Dakota.
Rose vs. Treadway, 4 Nev., 455.
Webster vs. Luther, 50 Minn., 77.
Sylvester vs. State, 91 Pac., 15—Washington.
Bryan vs. Graham, 91 Pac., 114—California.

The Department of the Interior has also followed the same rule.

Maker vs. Hollingsrake, 22 Land Dec., 375.
Wheaton vs. Wallace, 24 Land Dec., 100.
Gullett vs. Durango, etc., Co., 26 Land Dec., 413.
Clayton vs. Wilmot, 28 Land Dec., 183.

THE LANGUAGE OF THE COAL LAND ACT CANNOT BE CONTROLLED, AND THE RIGHT OF ENTRY THEREBY EXPRESSLY GIVEN DESTROYED, BY ANY CONSIDERATION OF SUPPOSED PUBLIC POLICY NOT EXPRESSED IN THE ACT ITSELF.

It would seem to be sound doctrine that a positive right confered by statute can be taken away only by the same authority.

Neither departmental ideas as to what the law *ought* to be, nor the theories of any individual as to supposed governmental policy not expresed by statute, can be relied upon as safe guides, particularly where such ideas or theories would operate to restrict the right granted by statute and deprive certain persons or classes of persons of its benefits.

Especialy unsafe and dangerous would it be to concede that such considerations might operate to *create an offense* by making a crime out of the doing of that which is not denounced by any statute.

This court has twice used the following language:

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statute."

Hadden vs. Collector, etc., 5 Wall., 107-111.

Bate Refrigerator Co. vs. Sulzberger, 157 U. S., 1-37.

And, again:

"Where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of the department."

St. Paul and M. and M. Ry. vs. Phelps, 137 U. S., 528.

And:

"When the law-making power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such case is what the *statute enacts.*"

U. S. vs. Trans. Missouri Freight Ass'n., 166 U. S., 290.

These authorities, together with those heretofore cited from this court, would seem to dispose of the contention made below that this prosecution may be based upon some supposed policy of the government not found in the act itself.

THE MATTERS IN THE "DECLARATION" ALLEGED TO HAVE BEEN FALSE ARE NOT SHOWN TO HAVE BEEN MATERIAL.

It will be conceded, we think, that unless the statements in the "declaration" which are negatived were material, the indictment cannot be sustained.

It is nowhere charged that the statements that declarant was over twenty-one years of age, that she was a native born citizen of the United States, that she had never had the right of purchase under the coal land law, either as an individual or as a member of an association and that she never held any other lands under said law, were false or untrue.

Nor is there any allegation that there was any question between rival claimants for the land or that any other person had or asserted any claim thereto. On the contrary the indictment expressly avers that the lands were then and there coal lands of the United States, "*open to purchase and entry as coal land.*"

This is the only direct averment or charge in the whole indictment as to the status of any lands.

The positive allegation is that "then and there" the lands described in the "declaration" were so situated that there was no obstacle intervening to their entry and purchase under the coal and land law, and, in effect, that *any* person having the qualifications required by section 2347, and not having theretofore made an entry, might enter and purchase the same.

The language excludes all question of existing controversy between rival claimants as to who had the better right to enter.

It follows, we think, that, if in the absence of any charge to that effect, it can be *inferred* that affiant or any one else was applying for the land, it still must be conceded that, by the express terms of section 2347, such person had the "right to enter" them, if he possessed the qualifications required by that section and had not theretofore made an entry.

No other qualifications are required and no other conditions could lawfully be imposed.

Therefore, the only question which could, in any event, have been material was as to these matters.

There is no charge that any statement as to any of such matters was untrue.

Much might be said and many authorities (in addition to those already referred to) might be cited upon this branch of the case, but we deem it unnecessary at this time to do more than refer to the full discussion and authorities cited in the brief filed by counsel for defendants in error in case No. 287, United States vs. Forrester, et al.

No good purpose could be served by a repetition of the arguments or authorities bearing on this proposition and therein contained.

This direct averment, as we understand the law, will control any recital in the "declaration" set out in the indictment, if, indeed, such recital can be looked to for any purpose; which we do not concede.

We have here reargued some of the objections urged below, but not referred to in the opinion of the court in the Keitel case.

If the indictment is indeed subject to these objections, and if it is in fact insufficient for any of these reasons, the defendant ought not to be put to trial upon it, and a conviction, we believe, would not be sustained. If the objections to the indictment, in fact, exist, the *judgment* rendered was *right*, whatever the reasoning of the court may be. In fact, we understand the reasons given by a trial court for its judgment are no part of the judgment itself. The question on appeal is, Was the judgment erroneous?

We do not concede that the reasons given by the court were insufficient, but we do contend that if this court finds the indictment fatally defective for any reason, whether given by the District Court or not, the judgment should be affirmed.

We, therefore, insist that the indictment does not state or charge any matter concerning which the affidavit was used or intended to be used.

That the indictment does show that the affidavit was presented and intended to be presented to the officers of the local Land Office and not to the Secretary of the Interior, and that there is no showing or contention that the matter ever passed beyond the jurisdiction of the local officers, or that the juris-

diction of the Secretary of the Interior was ever invoked or attempted to be exercised.

That the indictment does not anywhere, outside the affidavit itself, describe any land, and that the description in the affidavit, if it can be considered at all, being only by initials, is defective under the judgment of Mr. Justice Field, heretofore cited, and is wholly insufficient.

That section 4746, under which the indictment is drawn, applies only to pension and bounty land matters and matters of that nature, and that the theory of the government that the statute applies to all matters before officers in any department over which the Secretary of the Interior may have supervision, is untenable.

That the indictment does not negative or deny that the applicant had all the qualifications required by the coal land statute to make entry and purchase of coal land, and does not deny the statement that she never exercised her right or held any lands under its provisions, and does not allege that the affidavit was false in any particular as to which any statement or showing is required by law.

That such statements, if required at all, can only be required by regulations of the department, and that no criminal prosecutions can be instituted for the acts complained of, they not being in violation of any federal statute.

The District Court followed section 4746, R. S., U. S., according to its plain and obvious meaning, and the only decision the court made concerning this indictment was to hold that it did not state facts sufficient to bring it within the provision of that statute, and in the absence of a construction of that statute by the District Court this court is without jurisdiction.

Respectfully submitted,

B. W. RITTER,
N. C. MILLER,
Attorneys for Defendant.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR, v. F. W. KEITEL ET AL.	No. 625.
THE UNITED STATES, PLAINTIFF IN ERROR, v. ROBERT FORRESTER ET AL.	No. 626.
THE UNITED STATES, PLAINTIFF IN ERROR, v. CHARLES E. HERR AND GEORGE C. FRANKLIN.	No. 630.
THE UNITED STATES, PLAINTIFF IN ERROR, v. GEORGE E. HERR.	No. 631.

MOTION TO ADVANCE.

Comes now the Solicitor-General on behalf of the United States, and moves the court to advance the above-entitled causes upon the docket, for the following reasons, viz:

(1) Their early hearing would accord with the intent and policy of the act of Congress approved March 2, 1907 (34 Stat., 1246), providing for writs of error in certain instances in criminal cases, pursuant to which the writs of error were sued out.

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(2) These are criminal cases involving questions of much public importance touching the protection and disposal of the public coal lands of the United States and the functions and authority of the Land Department in regard thereto, conspicuous among which is the question (raised and decided in the court below in all of the causes but one—*United States* v. *Herr*, No. 631), whether a conspiracy to procure for a corporation or other association or an individual, quantities of such lands exceeding the quantities which either an individual or an association may directly enter and purchase under the coal-land law (Rev. Stat., secs. 2347–2352), by means of divers entries and conveyances to be made by individuals hired by the conspirators to make them—in other words, a conspiracy contemplating the practice of such a scheme as was pronounced fraudulent by this court in the case of *United States* v. *The Trinidad Company* (137 U. S., 161)—is punishable as a criminal offense under Rev. Stat. section 5440.

The court below held in these cases (except No. 631, *United States* v. *Herr*, which does not involve conspiracy) that such a conspiracy is not an offense under that section; while the District Courts for the Districts of Utah and Wyoming and the Eastern District of Wisconsin have recently adjudged that it is.

(3) Other important criminal cases, involving this question, are now pending in Colorado, Utah, and New Mexico, and are likely to be brought to trial before any of these cases, should they follow the

usual course, could be reached for argument; and investigations by the Department of Justice and the Department of the Interior have indicated that in Colorado and in other jurisdictions acts and conspiracies similar to those charged in the indictments in these causes have been committed, which, if criminal, should be promptly prosecuted, to avoid the bar of the statute of limitations. Such prosecutions, because of their peculiar features, entail very considerable expense to the public, even in their investigation and preparation, and, in Colorado, could not properly or successfully be presented to grand juries while the attitude of the District Court there, above indicated, remains unchanged.

(4) Moreover, the rulings of the court below, in all of these cases, and the views expressed in connection therewith in the written opinions cast grave doubt upon the force and validity of the regulations promulgated by the Land Department under the coal-land law, and upon the legal standing of all similar regulations, and, in effect, pronounce limitations not hitherto recognized by this court, upon the jurisdiction of that department and its officers, including the Secretary of the Interior, and upon the significance and seriousness of their functions and their relations to the Government as its representatives in the matter of the disposal of its public lands, thus tending to create uncertainties in the public mind in regard to the authority of that department, and to embarrass it in the performance of its duties.

As another and more specific result of such rulings, the Government, while they stand, will not be able in Colorado to maintain any charge based upon the making or presentation to the Land Department of false and fraudulent affidavits relating to coal land entries, as in violation of the act of July 7, 1898 (30 Stat., 718), although such charges are presented in one of the causes now pending there, which in the questions involved is quite like the above-entitled cause, No. 631; nor, in the face of such rulings, will the Government be permitted, it would seem, in prosecutions of fraudulent conspiracies affecting such lands, to introduce proofs of the actual making or filing of such false documents, or of conspiracies contemplating the making or filing thereof for the purpose of deceiving officials of the Land Department.

For all of the above reasons it is respectfully submitted that an early argument of these causes would much accord with the public interests.

As the Government deems it of great importance in the due administration of the criminal laws that these cases should be heard and, if possible, determined at this term, the Solicitor-General suggests that if the court shall grant this motion, the cases be set for hearing on April 6 next.

So far as the Government is concerned the cases may be heard as and in the time of one case. Counsel in the case of the *United States* v. *Robert Forrester et al.*, No. 626, however, object to the consolidation of that case with the case of the *United States* v. *F. W. Keitel et al.*, No. 625, for hearing, on the ground of

"vitally different questions of law being involved in said causes respectively," and counsel in case No. 631, *United States* v. *Kerr*, objects to the consolidation of that case with the others because different legal questions are involved, but indicates that a short oral argument of fifteen or twenty minutes only will be necessary to point out the distinctions.

Due notice of this motion has been given and acknowledgment of service filed with the clerk. Opposing counsel, for the most part, are understood to concur.

HENRY M. HOYT,
Solicitor-General.

FEBRUARY, 1908.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
F. W. KEITEL, ARIE KEITEL, FRANK P. Fay, et al. — No. 286.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ROBERT FORRESTER, BENJAMIN N. FREEman, Otis B. Spencer, et al. — No. 287.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES E. HERR AND GEORGE C. Franklin. — No. 291.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES E. HERR. — No. 292.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

REPLY BRIEF FOR THE UNITED STATES.

I.

The Interior Department has always held it unlawful for one person to make an entry for the benefit of another.

The Interior Department has, from the time the question was first presented, held that an entry could not be made by one person for the benefit of another. (Adolph Peterson et al., 6 Land Decisions, 371; North

Pacific Coal Company, 7 Land Decisions, 422, cited with approval in the Trinidad case.) Both of these decisions deal with cash entries. The same ruling is applied to cash entries under preference right in Union Coal Company (17 Land Decisions, 351). The statement that the Interior Department has held the acts contemplated by these defendants not to be criminal is not supported by the decisions cited by the defendants, and we are confident that no authority for their statement can be found.

The practice of the Land Office and the regulations of the Interior Department recognize the right of a person to make an entry through an agent when the name of the principal is disclosed. In such a case the principal takes the benefit of the act and can not make another entry thereunder. The agent has not taken the benefit of the act and may subsequently make an entry for his own use. When the Interior Department requires that unless the entry is made for a disclosed principal, it shall be made for the sole benefit of the entryman, it is merely doing what the law clearly authorizes. To permit entries to be made for undisclosed principals, as is charged was contemplated by the conspiracies in these cases, would nullify the statutory provision that one person or association of persons can make only one entry, for it would throw wide open the door for fraud; it would invite fraud. The coal land laws could not be administered in any orderly way if such a thing were permitted. So, aside from any question whether the person who makes an entry or the other person

for whose benefit it is made, is, individually, qualified to make an entry, and even assuming they both are qualified, the making of any entry in the way contemplated in the conspiracies would be a fraud upon the Government. It was planned that each entryman would make an entry for an undisclosed principal, a thing which can not be done unless the restrictions of the coal land laws are to be rendered useless. As soon as one man should make entry in the manner described in the indictments the corporation would be disqualified from again directly or indirectly making an entry. The intentional concealment of the fact that the entry was in fact made for the corporation, as was planned by defendants to do, would be a palpable fraud, for the Government would be left in ignorance of the disqualification of the corporation. In these cases this concealment was planned for the very purpose of having the corporation make other entries, and so far as the Government would have any knowledge the corporation could make another entry in its own name. Is this not clearly unlawful and fraudulent?

II.

Trinidad case can not be distinguished.

Attempt is made to distinguish the Trinidad case from the present cases on the ground that in the former the corporation itself was at the inception of the scheme disqualified to make an entry under the coal-land laws and in the present cases the corporation to which the lands were to be conveyed was not

at first disqualified to make an entry in its own name. Aside from this single point the Trinidad case in respect to the entries of employees is on all fours with these cases, and this point is immaterial. The conspiracy contemplated that a number of men would make entries for the benefit of a certain corporation. Necessarily in carrying out this conspiracy the entries could not be made and acted upon simultaneously, and the overt acts alleged show that they were not. The first man makes application, pays his money, and gets his receipt. This is all done at the same time and title then passes. The land has been acquired for the benefit of the corporation. It has been acquired by its agents. The man acted, not for himself, but for the corporation, and his acts are its acts. Clearly at that point an entry has been made by the corporation, and it has taken the full benefit of the coal-land laws, and is therefore disqualified from making another entry the same as if it had acquired the lands directly upon its own application without the use of "dummies." At that point of the execution of the conspiracy charged we have exactly the same facts as existed in the Trinidad case, when the plan, there held to be unlawful, was devised and put into operation. Every act done subsequently to that time in connection with the making of the entries would be as unlawful as the acts of the employees in the Trinidad case.

It is absurd to say that there is a difference between a case where the corporation is disqualified before any act is done in performance of the conspiracy and one

where the corporation is necessarily to become disqualified during the execution of the conspiracy. That is all the attempted distinction of defendants amounts to.

The statute provides that the same person or association of persons can make only one entry. The policy of the law, as thus expressed, is to protect the coal lands against monopoly and in trust for all the people, as said in the Trinidad case. What real difference is there between a corporation which has availed itself of the law by acquiring 320 acres, hiring entrymen to purchase and convey to it more coal lands, and a corporation which has not availed itself of the law, hiring four entrymen to purchase and convey to it 640 acres? If the latter is lawful, all that will be necessary in order to evade the law is to organize a corporation and have it act instead of a corporation which has taken the benefit of the act. The law was clearly intended to prohibit this.

III.

As all steps necessary to complete entry under the coal-land laws are taken at the time entry is initiated, there is no opportunity for an assignment of an entryman's interest between initiation and completion of the entry.

Counsel for defendants have dwelt at length upon the right of a person who has made application under the coal-land laws and has not obtained title to the lands being entered by him to assign his interest, and the Williamson case and other like cases are relied upon in this connection.

In the first place, no question as to such a right is presented by these indictments. All of them charge a conspiracy formed prior to the making of any application and to the making of any declaratory statement asserting a claim for a preference right. However, as statements have been made by them tending to obscure a clear understanding of the coal-land laws and their operation, we feel their statements should not be allowed to stand unanswered.

Coal-land entries are known as cash entries or cash entries under a preference right. In the former, an application is made, the money paid, and receipt taken therefor at the same time, and all as one transaction. Entry is then complete and is so regarded by the Interior Department. The entryman may present his receipt and obtain a patent, but title passes when the receipt is taken. It is apparent that there can be no such thing as an assignment of any right in a cash entry. Until application is made, there is no right existing, for, by the language of section 2347, a person has a right only "*upon application.*" At the time application is made, other steps are taken which complete the entry. The Government does not contend that the land can not, after issuance of receipts, be conveyed if the person actually making the entry has, up to that point, been acting in good faith and for his own benefit or for a qualified disclosed principal.

Cash entries under a preference right are made as follows: A declaratory statement claiming a right to make an entry upon certain described lands in pref-

erence to any one else is filed. This is no part of the entry. It is merely notice that a person filing it is in possession of the land and will subsequently make an application to enter. The only effect of filing a declaratory statement is to give the person filing it a right precedent to all others to make entry for the lands described. In other words, it places his name at the head of the list of those who may subsequently apply for entry to those lands. If at any time he abandons possession of the land, his claim immediately lapses without any action by the Government. Clearly the filing of a declaratory statement gives no vested right. (*Union Coal Company*, 17 Land Decisions, 351.) Within one year after the declaratory statement is filed, application for entry must be made. At the time such application is made the money is paid, receipt taken, and title passes the same as in what is known as a cash entry. For the same reasons as in the case of a cash entry it is apparent that there can be no such thing as an assignment of any right in a cash entry under a preference right. It is true that paragraph 37 of the coal-lands regulations in force prior to April 12, 1907, recognized assignments of the right to a preference. This assignment, however, merely transferred the right to pursue the preference. It did not transfer any right in a coal-land entry, for the entry itself had not been initiated. The Interior Department has always held that when such assignment was made both assignor and assignee were disqualified from making entry except to the lands to which the preference right related, or from asserting

or pursuing a preference right to any other lands. The assignor was regarded as disqualified, because he had asserted a preference and received for it a consideration which he deemed equivalent to the advantage the preference gave him; the assignee, because he had reaped the benefit of the assertion of the preference and was the one who had initiated and completed the entry. We do not need to consider the correctness of the ruling of the Interior Department as to the disqualification of the assignor, as these indictments certainly contain no charge that it was planned that one person should, after filing one declaratory statement, make another or make an entry to other lands. The ruling that the assignee was disqualified from making another entry or asserting another preference is clearly right, for he alone is the one initiating and completing the entry. It is obvious, therefore, that even if the indictments charged only that the defendants conspired to have the corporation take a large number of assignments of preference rights without disclosing the same, and procuring entries to be initiated and completed in the names of the assignors, title to be then conveyed, a conspiracy to defraud would be charged. Much more is charged, but it is as unlawful to conspire to do that as it is for a person to procure several others to make cash entries in their names for his benefit without disclosing the fact.

The question was asked as to the meaning of the word "enter" or "hold," as used in section 2350. If it becomes necessary to consider this it will be

found that the word "enter" is defined in the *Dealy case* (152 U. S., 539) as embracing the whole transaction from the initiation of the entry to its completion. As used in section 2350, it prohibits the taking of any step in the process of entry which begins with the filing of an application and is completed with the taking of receipts. The word "hold," as used in section 2350, is intended to cover the qualified possession of one who has filed a declaratory statement claiming a preference right, but has not filed application.

IV.

Decisions construing timber and stone act are irrelevant.

The timber and stone act provides that a person desiring to avail himself of the act must file an affidavit stating among other things: "That deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself." After a publication for sixty days of notice of the application the applicant may, upon furnishing final proof of certain enumerated things (the facts required to be stated in the affidavit as above set out not being included), enter the lands. All that the Williamson case holds is

that such laws do not require that there should be included in the final proof any proof that the facts above set out as required in the affidavit accompanying application continue to be true, and the applicant may therefore, between the time of his application and of his final proof, contract to convey after patent. Similar rulings have been made in *Adams* v. *Church* (193 U. S., 510) and other cases cited by defendants.

The provisions of the coal-land law are very different, and those decisions can not apply to coal land entries; for, as we have just shown, there is no opportunity for assignment between initiation and completion of coal-land entries. Moreover, the coal-land laws prohibit a person or association from making more than one entry thereunder. The question here is, When has a person made an entry under the act? We see no escape from the conclusion that when A procures B to make an entry for the purpose of conveying the lands to A when B obtains patent, and A furnishes all the money, does all the work, and pays B a bonus, A has made entry under the act.

V.

The General Mineral Act.

The General Mineral Act of 1872 has never been held by the courts or the Interior Department or considered by any one else as being applicable to coal lands. No coal-land entry was ever made under it and no claim of a right to enter coal lands under that act has ever been asserted so far as the records of the General Land Office show. Since 1864 entry of

coal lands has been provided for in laws specifically and exclusively applicable to coal lands.

The following letter, found in the Congressional Globe for the Forty-second Congress, second session, page 2084, explains the history of the coal-land laws and the reasons for the enactment of the act of March 13, 1873:

> DEPARTMENT OF THE INTERIOR,
> GENERAL LAND OFFICE,
> *Washington, D. C., February 6, 1872.*
>
> SIR: I have examined the inclosed bill, Senate 522, "to provide for the sale of the lands of the United States containing coal," referred to this office by the department proper, and with reference to the subject I have the honor to state as follows:
>
> The only legislation heretofore had by Congress respecting coal lands is comprehended in the act of July 1, 1864 (Statutes 13, p. 343), and the act supplemental thereto, approved March 3, 1865 (same, p. 529).
>
> The first of these enactments authorizes the President, after three months' public notice, to dispose of any tracts embracing coal beds or coal fields, constituting a portion of the public domain, to the highest bidder, and in suitable legal subdivisions, at a minimum price of $20 per acre, and allows any such tracts not disposed of at such public offering to be thereafter entered at private sale at such minimum. This law is objectionable in affording no protection whatever to parties who may have actually expended their time, labor, and capital in opening up and developing coal mines in the

public domain, and also in failing to limit the right of purchase to a given quantity, thus interposing no bar to monopoly.

As no lands have ever been proclaimed for sale under said act, of course no entries have been effected thereunder.

The supplementary act of March 3, 1865, aforesaid, provides in substance that citizens of the United States who were on the 3d March, 1865, in the business of *bona fide* actual coal mining upon public lands for purposes of commerce, may have the right to enter 160 acres or less quantity in legal subdivisions, including their mining improvements and premises, at the minimum price of $20 per acre.

The privilege thus granted is a special and not a general one, affording no protection to miners unless they were operating coal beds or coal fields on the 3d March, 1865.

Under its provisions several entries have been effected by parties coming within the letter of its requirements where the lands have been surveyed.

The proposed law will, if adopted, guard against monopoly by restricting the right of purchase to a stipulated number of acres, will protect the right of parties who are now developing these mines, or who may hereafter expend their labor and capital in doing so, by giving them a preference right of entry of a specified number of acres embracing their improvements, and will enable the Government to realize a fair price for the tracts so disposed of.

Proximity to completed lines of railroad forms the basis of acre valuation.

The acts of Congress heretofore cited with reference to coal lands are virtually inoperative, and a thorough consideration of the subject lead this office to believe that the proposed legislation would tend greatly to the public interest and enable the department to deal practically with a question assuming great importance in the administration of our public land system.

With great respect, your obedient servant,

WILLIS DRUMMOND,
Commissioner.

Hon. COLUMBUS DELANO,
Secretary of the Interior.

The provisions of the General Mineral Act and the Coal Land Act of 1873 are radically different. In the former the amount of land which may be embraced in one location is limited, but one person may make any number of locations, or make any number of contiguous locations. The only provision of that law intended to prevent large acquisitions by one person is the requirement that a certain amount of money must be expended annually on each tract entered. When Congress passed the General Mineral Act it appears from the Congressional Globe that a bill providing for the enactment of what have become and are known as the coal-land laws was under consideration. It is evident that Congress did not intend the General Mineral Act to apply to coal lands, for immediately after its passage it enacted the coal-land laws. Congress regarded the provisions of the General Mineral Act inappropriate to coal lands, for the bill which became

a law March 3, 1873, expressly and clearly prohibited one person or association of persons from making more than one entry; and it was radical in this prohibition, for it goes to the extreme of prohibiting an association from making entry if any member of it has made entry and of prohibiting any member of an association which has made entry from making entry. Congress has in the strongest way possible manifested its purpose to limit the right to enter coal lands, and the suggestion of overruling this clearly expressed intention because the General Mineral Act allows one person to make any number of entries is absurd. It is also apparent that any reference in this connection to the policy of the Interior Department in permitting rights acquired under the General Mineral Law to be assigned is misleading. There is no occasion for restricting the right of assignment under that law, for the amount that one person may acquire is unlimited. It is quite different in the case of the coal-land laws, which do limit the quantity one person may purchase.

Respectfully submitted.

CHARLES J. BONAPARTE,
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HENRY M. HOYT,
Solicitor-General.

EDWIN W. LAWRENCE,
Special Assistant to the Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
F. W. KEITEL, ARIE KEITEL, FRANK P. Fay, et al. — No. 286.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ROBERT FORRESTER, BENJAMIN N. FREEman, Otis B. Spencer, et al. — No. 287.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES E. HERR AND GEORGE C. Franklin. — No. 291.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
CHARLES E. HERR. — No. 292.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR THE UNITED STATES.

The United States has sued out writs of error in the above-entitled cases under the criminal appeals act, indictments therein having been quashed, or demurrers to the indictments sustained, in decisions based upon the construction of statutes upon which the indictments are founded.

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The defendants in Nos. 286, 287, and 291 were indicted under section 5440 of the Revised Statutes, as amended, charged with conspiracy to defraud the United States by conspiring to acquire public coal lands greatly in excess of the quantity they could lawfully acquire, by means of entries which would be fraudulent in that (among other things) they would purport to be made by entrymen in good faith for themselves when in fact they would be made for defendants and corporations, the defendants and the corporations alike being disqualified under the law from making such entries, and in No. 286, also by means of forged, fictitious and feigned affidavits and powers of attorney. The second count in No. 286 charges defendants therein with conspiracy to commit an offense against the United States under section 4746, Revised Statutes, as amended, by willfully making and presenting, and procuring others to make and present writings and papers which would be fraudulent in the same respect and would also be forged, fictitious and feigned, all pertaining to coal land entries, a matter within the jurisdiction of the Secretary of the Interior. In the Herr case (No. 292) the indictment charges a violation of said section 4746, in making like false and fraudulent statements, no conspiracy being alleged.

The District Court held that—

1. The word "defraud" was used in section 5440 in its common-law meaning; in conspiracies to defraud at common law "the ends intended by the con-

spirators must necessarily involve moral turpitude of the basest sort, in the results, if successful, such as threaten the health of a large body of people by the sale of impure food, or, in some instances, even life;" the conspiracies charged were not "conspiracies to defraud" as thus defined.

2. Section 4746, as amended, refers only to pension and bounty land matters.

3. Jurisdiction of the Secretary of the Interior, within the meaning of section 4746, as amended, does not embrace papers and statements filed in coal land entries, unless perhaps when an appeal to him is prosecuted, which was not done in these cases.

4. The alleged false, fraudulent, forged, fictitious and feigned statements, affidavits, etc., were not required by law to be made or filed, except possibly the application of an entryman to the effect that he is qualified as such and has not theretofore exercised his right, which facts are not negatived in the indictments; and the regulations of the Interior Department requiring them (with the above exception), therefore, could not be considered in determining what is criminal.

Error in all of these conclusions is assigned.

THE INDICTMENTS.

The first count of the Keitel indictment (No. 286) charges that defendants corruptly and willfully conspired to obtain from the United States for themselves and a corporation public lands, situated in the District of Colorado, greatly in excess of the

quantity they could lawfully obtain from the United States, thus defrauding the Government of its valuable property in such lands, and also of its governmental function in the matter of preserving and disposing of said lands, as well as of its right to administer an intelligent and honest service in that behalf and in the interests of the people of the said United States. It is charged that to effect this unlawful object defendants conspired to make false, fictitious, feigned, illegal, forged, and fraudulent entries and filings (the filings to consist of declaratory statements, applications to enter, powers of attorney, nonmineral affidavits, and affidavits at purchase) upon public coal lands of the United States of great value, and to procure and hire others to do the same, thus inducing the Government officials having the sale of such lands in charge to act in a way contrary to the way they would act if they were aware of the true character of such entries and filings; "dummy" entrymen were to be hired who would be furnished by defendants with money necessary to make payments to the Government, and after obtaining title in their own names the "dummies" would convey to defendants or said corporation; the entries and filings were to be fraudulent in that they would purport to be made by the entryman for himself and not directly or indirectly for the use or benefit of the defendants or said corporation, and in that the entryman would not be in actual possession of the land as represented, and the affidavits, powers of attorney, etc., were to be forged, fictitious,

and feigned by reason of not being made under oath and subscribed and sworn to before any officer competent to administer an oath, and by having jurats attached thereto which would be false, fictitious, forged, and fraudulent.

Twenty-four overt acts are then charged to have been committed in pursuance of said unlawful conspiracy and to effect its object.

These acts are the filing of coal land entries and execution and filing and procuring others to execute and file fraudulent and forged papers in connection therewith.

The second count charges that defendants did unlawfully, willfully, corruptly, wickedly, and knowingly conspire, combine, confederate, and agree together and with others to make and present false, fictitious, feigned, forged, illegal, and fraudulent filings, declarations, affidavits, certificates, and papers and writings to the register and receiver of a land office in said District in certain described coal entries and to procure, induce, persuade, and hire others to do the same, the said coal entries being a matter and proceeding within the jurisdiction of the Secretary of the Interior, in violation of section 4746, Revised Statutes, said filings, etc., being false, fictitious, feigned, illegal, forged, and fraudulent in the same respects as the filings, affidavits, etc., referred to in the first count.

Sixteen overt acts performed in pursuance of said unlawful conspiracy and to effect the object of the same are then set out, consisting of filing certain

false, fictitious, forged, and fraudulent powers of attorney, papers, and filings in certain coal land entries.

Indictments in Nos. 287 and 291 are substantially the same as the first count of the indictment in the Keitel case, but involving different parties; the charges here, however, do not embrace making and presenting affidavits, powers of attorney, etc., which would be forged, fictitious, and feigned by reason of not being made under oath, etc. In No. 291 other false and fraudulent representations are charged to have been contemplated, namely, that the entryman was acquainted with the character of the land, that he had frequently passed over it and that he had located a valuable coal mine thereon. In both cases the court decided the questions raised solely upon authority of its decision in the Keitel case.

The indictment in No. 292 charges a violation of section 4746, Revised Statutes, in procuring certain persons to make, subscribe, and present to the Secretary of the Interior, by and through the register and receiver of the United States land office at Durango, Colo., affidavits in connection with coal land entries, which were false and fraudulent in the same respects that the filings and papers to be made in the conspiracy charged in No. 291 were to be false and fraudulent. The court treated this indictment as involving the same questions presented by the second count of the indictment in the Keitel case.

STATUTES INVOLVED.

The following Revised Statutes are involved:

SEC. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register or the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

SEC. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or

mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

SEC. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

SEC. 2351. In case of conflicting claims upon coal lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the

valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

SEC. 5440 (as amended). If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court.

Section 4746, Revised Statutes, was amended by act of July 7, 1898 (30 Stat., 718). The section as amended reads as follows, the words added being in italics:

That every person who knowingly or willfully *makes or aids, or assists in the making* or in any wise procures the making or presentation of any false or fraudulent affidavit, *declaration, certificate, voucher, or papers, or writing purporting to be such*, concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions *or of the Secretary of the Interior*, or who knowingly or willfully *makes or causes to be made, or aids or assists in the making*, or presents or causes to be presented at any pension agency

> any power of attorney or other paper required as a voucher in drawing a pension, which paper bears a date subsequent to that upon which it was actually signed or *acknowledged by the pensioner, and every person before whom any declaration, affidavit, voucher, or other paper or writing to be used in aid of the prosecution of any claim for pension or bounty land or payment thereof purports to have been executed who shall knowingly certify that the declarant, affiant, or witness named in such declaration, affidavit, voucher, or other paper or writing personally appeared before him and was sworn thereto or acknowledged the execution thereof, when, in fact, such declarant, affiant, or witness did not personally appear before him or was not sworn thereto or did not acknowledge the execution thereof*, shall be punished by a fine not exceeding five hundred dollars or by imprisonment for a term of not more than five years.

As to defendants' contention that this court is without jurisdiction to hear and determine these cases, we beg to refer the court to the brief heretofore filed on behalf of the United States upon motion to dismiss made in the Keitel case.

ARGUMENT.

I.

The charge here made against defendants of conspiracy to defraud is specifically made a crime by statute.

Defendants are charged with conspiracy to defraud the United States under section 5440. Obviously, a crime is charged which is specifically made such by statute.

Arguments that because the coal-land laws do not specifically make it a crime for an individual to obtain lands in excess of the designated quantity, it is not criminal to do so, are manifestly fallacious. Those laws furnish an occasion for a conspiracy to defraud, which is specifically made a crime by section 5440, just as many other laws, or departmental regulations even, furnish the occasion for crimes under statutes which otherwise have no connection with them. (*Caha* v. *United States*, 152 U. S., 211; *Curley* v. *United States*, 130 Fed., 1—petition for certiorari denied—195 U. S., 628.)

In the former case it was held that regulations of the Interior Department, relative to contests in land cases, might properly furnish the occasion for perjury under section 5392.

In the Curley case regulations furnished the occasion for the crime of which Curley was convicted, a conspiracy to defraud under section 5440.

So in the present cases the coal land laws furnish the occasion for a conspiracy to defraud.

II.

Departmental regulations are not essential to the conspiracy to defraud here charged.

Regulations requiring the filing of the statements, powers of attorney, and affidavits referred to in these cases are authorized by law and may properly constitute the occasion for a crime defined and punished by statute, whether it be a conspiracy to defraud or some other crime. The authorities and reasons for this are discussed more fully below (p. 50). But the regulations should be put to one side in considering the charge of conspiracy here made, for they are not essential to it. In so far as the charge relates to the filing of statements, affidavits, powers of attorney, etc., it may perhaps be said to involve regulations, for the statutes do not expressly require anything to be filed except an application. But those regulations only require a positive and sworn statement of facts which it would be in violation of the coal land *laws* to conceal. The law limits the quantity of coal land one person may purchase from the United States, and for the entryman intentionally not to disclose that he is in fact purchasing for one who already has acquired the specified quantity is manifestly a fraudulent concealment. The papers filed pursuant to regulations constitute only part of the false and deceitful means by which defendants sought an unlawful end—the acquisition of public lands in excess of the area allowed by *law*. Therefore, it is not essential that the positive representations required

by regulation that the entryman is not purchasing for another be made. Statements made pursuant to such regulation are merely additional evidence of the fraud. The coal land laws make it impossible for defendants to acquire from the United States the quantity of land they sought except by fraudulent concealment as to whom the lands were in fact purchased for. Defendants are charged with this fraudulent concealment as well as false statements required by the regulations. We may disregard the latter, and a conspiracy to defraud will still be charged. We will now show that this court has so held.

III.

For individuals or associations to acquire from the United States coal lands in excess of the specified quantity through "dummy" entrymen is a violation of the coal-land laws and an actual fraud.

Right of *acquisition*, not of *alienation*, is here involved. All reference to the right of an entryman to alienate can only serve to confuse the issue. The statute expressly and in unambiguous language limits the right to acquire. It is with this limitation upon acquisition, not with the limitation, if any, the law places upon alienation, that we are concerned.

The conspiracy here charged antedated any right of an entryman to alienate. Such right does not accrue, at least, until an application is made and the conspiracy is charged to have been formed before that time and in part concerns acts preceding the making of the application. These cases are clearly

distinguishable from the *Williamson case*, 207 U. S., 425; the *Adams case*, 193 U. S., 511; the *Budd case*, 144 U. S., 154, and other like cases.

The question is not, has an individual or association the right to convey coal lands after they have been acquired or some right pertaining thereto, after application therefor has been made, or the right to acquire an unlimited area of coal lands from others than the United States, but it is, has an individual the right to *acquire from the United States* more than the specified quantity of coal lands?

In *United States* v. *Trinidad Coal Company* (137 U. S., 160) the Government sought to set aside patents to six tracts of coal land obtained by defendant through "dummy" entrymen, two of whom were its officers and four its employees. The officers were charged, inter alia, with having made false statements in their affidavits to the effect that they had not already purchased as individuals or members of any association any land under the coal-land laws. But it was not charged that the employees made any such fraudulent statements, merely that they did not disclose the name of the real purchaser, the defendant. The patents thus obtained by the employees, as well as those acquired by the officers, were set aside, the court holding they were obtained fraudulently and in violation of law. The case, in so far as it involves the patents of the employees, was identical with the conspiracies charged against the defendants, if we exclude from the latter all charges relating to the

making and filing of all papers except the bare application. The decision in that case is grounded upon the limitation contained in the statute and the fraudulent concealment, which, we submit, is the ground these cases should be decided upon. Mr. Justice Harlan said in that case:

> The restrictions imposed upon the entry and purchase of the vacant coal lands of the United States have been so clearly expressed that no doubt can exist as to the intention of Congress in enacting the above sections.

Replying to a contention that the scheme was not within the statute, he said:

> This contention can not be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute. If the scheme described in the bill be upheld as consistent with the statute, it is easy to see that the prohibition upon an association entering more than three hundred and twenty acres, or entering or holding additional coal lands, where one of its members has taken the benefit of its provisions, would be of no value whatever. It is true, in the present case, that some of the persons who made the entries in question were not, strictly speaking, members

> of the corporation, but only its employees. But as they were parties to the alleged scheme, and were, in fact, agents of the defendant in obtaining from the Government coal lands that could not rightfully have been entered in its own name, that circumstance is not controlling.
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> There is, consequently, in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained because if the facts admitted by the demurrer had been set out in the papers filed in the land office, the patent sought to be canceled could not have been issued without violating the statute. The defendant would not have been permitted to do indirectly that which it could not do directly.

Upon the authority of that case it is clear that any lands obtained as a result of the execution of these conspiracies could be recovered by the Government on the ground that they were obtained by fraud; and yet defendants and the District Court say this is not a conspiracy to defraud. It needs no argument to demonstrate the fallacy of such statements.

As said in *United States* v. *Lonabaugh* (158 Fed., 314):

> They knew that no individual could acquire more than 160 acres of land and that an association or corporation could not acquire more than 320 acres, except in one case, for which the statute clearly provides, for such is the

plain provision of the statute. But it was urged in argument that because the statute does not in express terms require an affidavit that the entryman is not taking the land for the benefit of another that, therefore, he may lawfully make a contract to sell or convey by deed, if not prior, certainly subsequent, to his making final proof. * * *

The coal-land laws (section 2350, U. S. Comp. St., 1901, p. 1441) provide that only one entry shall be allowed to the same person or association of persons; and an association of persons, any member of which shall have taken the benefit of such sections of the statute (that is, the sections which contain the provisions allowing them to enter coal lands) either as an individual or as a member of any other association, is prohibited from entering or holding any other lands under the provisions of those sections. So that when these defendants attempted to secure the lands described in the indictment in the manner disclosed by the evidence in this case they knew that they were committing a fraud, because the very agreement itself provides for doing indirectly what they, as individuals or as members of an association or corporation, could not do directly.

* * * To hold that a case is not made out upon such facts would be to hold that the provision of the statute limiting the amount of coal land to be taken under the provisions of the act, by an individual or association, means nothing. In other words, in order to

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> avoid the provisions of this statute, all a man would have to do after exhausting his own right would be to hire some one who had not exhausted his right to make the entry for him, the man desiring the land paying all of the expenses in connection therewith. Such, I think, can not be the law.

The coal-land laws can not be construed one way in a suit to cancel patents issued thereunder and another way in criminal prosecutions involving those laws. This is elementary. In the *Northern Securities case* (193 U. S., 197, 401) Mr. Justice Holmes clearly states the rule: "The words can not be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction."

The Trinidad case, therefore, conclusively establishes that the lands to be obtained by the conspiracies in these cases, would, if the conspiracies were consummated, be obtained in violation of law and by fraud practiced upon the United States.

It was, however, argued in the District Court at great length that the fraud referred to in the Trinidad case was constructive and not actual.

It is difficult to understand how one can fail to see at once that the scheme necessarily involved *intentional concealment of facts* in order to deceive and mislead the local land officers of the United States, and thereby obtain from the United States the possession of, the use of, and the title to coal lands which defendants knew without such concealment they could not obtain.

Every act done pursuant to the scheme was necessarily done to perpetrate an actual, premeditated fraud. Defendants knew they could not acquire lands if the name of the real purchaser was disclosed; they planned intentionally and designedly to deceive the officers of the Government and thereby acquire its property which they could not have obtained except by deceit. How can such action be called anything but actual fraud?

The Trinidad case forecloses to defendants every argument upon the question whether a conspiracy to defraud is substantially charged in these cases, except the contention that it is not the kind of fraud made a crime in section 5440.

IV.

A conspiracy to obtain public lands from the United States in excess of the area allowed by law by means of fraudulent entries is a conspiracy to defraud within section 5440, Revised Statutes.

The Congressional history of section 5440, the numerous decisions construing and applying this section, and a careful analysis of its language, conclusively establish that it was not intended to confine "conspiracies to defraud" punishable thereunder to offenses known to the common law as conspiracies to defraud; but that it was intended that the section should be applied in a broad and comprehensive way, so as to include frauds upon the United States of every kind and character, frauds upon its revenue, frauds upon its property of whatsoever kind, frauds upon its administration of the law when no pecuniary loss to the Government is involved, frauds upon the

United States of every conceivable sort. Upright and honest dealing with the Government in all departments of its administration is commanded by this law; every conspiracy to deceive the Government is forbidden by it. By this law Congress aimed to protect the Government against those in whom avarice and cupidity are stronger than the desire for good government and honest execution of the laws. A narrow construction, such as that adopted by the court below, takes from the statute its power to accomplish the great purpose for which it was enacted.

A. *Congressional history of section 5440.*

Judge Lanning, in *United States* v. *Stone*, 135 Fed., 392, states the Congressional history of this law as follows:

> Section 5440 is a revision of section 30 of the act entitled "An act to amend existing laws relating to internal revenue, and for other purposes," approved March 2, 1867 (14 Stat., 484, c. 169). In its original form the clause concerning the defrauding of the United States was "to defraud the United States in any manner whatever." If it be assumed that the section in its original form, and as a part of the act of 1867, was not applicable to any frauds except those concerning the internal-revenue, the section in its present form and place can not be so limited. In the revision of 1878 it was transferred from its place in the internal-revenue laws to a place in the laws concerning crimes, and to the subdivision of crimes entitled "Crimes against the operations of the Government."

> At the same time the clause concerning frauds was changed to the form "to defraud the United States in any manner or for any purpose." Obviously, it was the legislative intention by these changes of language and place to make the section applicable not only to conspiracies to defraud the United States of its revenue, but to every conspiracy to defraud the United States, whatever the purpose of the conspiracy might be.

B. *Land-fraud cases to which section 5440 has been applied.*

While it has been often urged in Federal courts that the word "defraud" was used in section 5440 in its common-law sense, that argument has heretofore always been rejected. The decision of the District Court in these cases is not only without precedent, but is contrary to numerous decisions of district and circuit courts, circuit courts of appeals, and this court.

Unless the principle of *stare decisis* is to be wholly disregarded, the decision of the District Court must be reversed.

The decisions are as follows:

Hyde v. *Shine* (199 U. S., 62) was a habeas corpus proceeding arising out of a proceeding to remove the defendants to another district for trial. They were charged under section 5440 with a conspiracy to defraud the United States of public lands. The sufficiency of the indictment was questioned and passed upon. It was alleged defendants conspired to obtain State school lands in the names of fictitious per-

sons and of persons not qualified to purchase them, because they were not obtaining the lands for their own use, the lands thus obtained to be exchanged for public lands of the United States by means of false and forged conveyances.

The court held that a conspiracy to defraud was charged under section 5440 (all the justices concurring on this point), and said, in part:

> The argument that this indictment can not be sustained because the United States, having received the school lands in lieu of the lands patented, were defrauded of nothing, if valid at all, applies equally to the school lands for which the States of California and Oregon must have received a statutory compensation, fixed at $1.25 per acre. Having received this compensation, it may be said, with equal propriety, that they were defrauded of nothing. The result of the argument then is that, although a gross imposition was practiced upon the States by the procuring of patents in favor of fictitious persons or of disqualified persons by the use of forged affidavits, assignments, or other documents, no indictment therefor would lie because the States had received the same consideration they would have received had the patents been issued to persons qualified under the statutes to purchase the lands. The unsoundness of this argument needs no demonstration.
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> Whatever may be the rule in equity as to the necessity of proving an actual loss or damage

to the plaintiff, we think a case is made out under this statute by proof of a conspiracy to defraud and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands and suffered no pecuniary loss. (*MacLaren* v. *Cochran*, 44 Minnesota, 255.) The law punishes the false practices by which the lands were obtained, and the question whether the Government stands in the position of a *bona fide* purchaser with respect to the school lands is not one which can be litigated in a criminal prosecution for a violation of law.

Even if the United States were in a position to claim the rights of a *bona fide* purchaser to the State lands, the methods by which these lands were acquired from the States, and the lands in exchange therefor procured from the United States, would be none the less a fraud of which the latter might take advantage in a criminal prosecution. The indictment under section 5440 charges a conspiracy to defraud the United States out of the possession, use of, and title thereto of divers large tracts of public lands, and if the title to these lands were obtained by fraudulent practices and in pursuance of a fraudulent design, it is none the less within the statute, though the United States might succeed in defeating a recovery of the State lands by setting up the rights of a *bona fide* purchaser.

In *Dealy* v. *United States* (152 U. S., 539) defendants, having been convicted of a conspiracy to defraud under section 5440, sued out a writ of error. The

indictment charged defendants with conspiring to defraud the United States of the title to and possession of large tracts of land by means of false and fictitious entries under the homestead laws and set out overt acts to effect such conspiracy. The sufficiency of the indictment was attacked, but was sustained by the unanimous opinion of this court.

In *United States* v. *Lonabaugh* (158 Fed., 314) the indictment charged a conspiracy to defraud the United States of coal lands, the objects of the conspiracy and the means of effecting those objects being substantially the same as those charged in the indictments in the cases at bar. Defendants after conviction moved for a new trial on the ground, among others, that the acts of defendants did not constitute a conspiracy to defraud. In denying the motion, the court said:

> Whenever it is made to appear that the wrong disposition of the public lands was induced by fraudulent practices on the part of the party charged therewith and done for the very purpose of circumventing the law and warping its due administration the United States is defrauded. I think there can be no question in this case that there was such a conspiracy or unlawful agreement on the part of these defendants, and its very purpose was to induce the land department of the Government, which is charged with the disposition of public lands, to dispose of the lands described in the indictment in a way not contemplated by the statute and in violation of the statute.

In *United States* v. *Robbins* (157 Fed., 999) there were indictments substantially identical with those in the cases at bar which were sustained upon demurrer, the same contentions being made as to the construction of the word "defraud."

In *Stearns* v. *United States* (152 Fed., 900; C. C. A., Eighth Circuit) the indictment was under section 5440 for conspiring to defraud the United States of lands by means of fraudulent entries under the homestead laws. Conviction was sustained. In considering the charge of the trial judge to the effect that if the defendants aimed to defraud the United States merely of possession of the lands it was an offense, the court said:

> But the right to the possession, like the right to make the entry, is extended only to those who intend to earn the title by faithfully and honestly complying with the law. To secure the entry by feigning such an intention is to secure it fraudulently, and to then use it as a mere cover for obtaining or prolonging an unlawful possession is to defraud the United States of the possession.

In *Bradford* v. *United States* (152 Fed. Rep., 617, C. C. A., Fifth Circuit) there was a similar indictment and the question, "Does the indictment sufficiently and properly describe and set forth any offense against the United States?" was answered in the affirmative. Petition for certiorari in this case was denied (206 U. S., 563). In its opinion upon the trial of this case (148 Fed., 413) the District Court

(p. 421) discusses the question of the application of section 5440 when the conspiracy contemplates defrauding the Government of nothing of pecuniary value, holding it should be applied to such a case for much the same reasons as stated in the Curley case, infra. *Gantt* v. *United States* (108 Fed., 61) is to the same effect.

In *United States* v. *Owen* (32 Fed., 534,) the indictments charged conspiracy to defraud the United States of public lands. Judge Deady said:

> To defraud "the United States in any manner or for any purpose" is a very comprehensive expression, and includes every conspiracy to deprive the United States, by the misrepresentation or concealment of material facts, of any kind of property, or whatever may be legally due it on account of taxes, duties, imposts, excises, or the like.
>
> For the demurrer it is argued that section 5440 applies only to a conspiracy to defraud the revenue of the United States. The reason given is that the section being taken from section 30 of the act of March 2, 1867 (14 Stat., 471), entitled "An act to amend existing laws relating to internal revenue, and for other purposes," the words "to defraud" must be limited to the subject-matter of the act, the internal revenue.
>
> The subject of the act is not limited by its title to revenue of any kind, but expressly includes "other purposes" or subjects. The language of the section gives no evidence that it was the intention of Congress to limit its operation to frauds upon revenue. Taken in its

> natural sense, the language includes a conspiracy to commit "any" crime against the United States, or to defraud it in any manner; and there is nothing in the circumstances of the case which ought to prevent it from having effect accordingly. As found in the Revised Statutes, there are some verbal changes in the section which only emphasize the general purpose and character of the statute. It is a wholesome and much-needed act; and it is difficult to assign any reason compatible with the public good, or the protection of the public property or dues, why any conspiracy to commit a fraud thereon or thereabout should be excluded from its operation.

United States v. *Gordon* (22 Fed., 250) sustains indictments charging a conspiracy to defraud the United States, and, setting out facts substantially like those alleged in the cases at bar. Nelson, J., said in reference to section 5440:

> It is immaterial what means were used to defraud, as it is criminal to conspire to defraud the United States in any manner or for any purpose, and the court does not care to know whether the modes adopted to accomplish the end proposed are made criminal or not.

See also *United States* v. *Mitchell* (141 Fed., 666).

C. *Other cases in which section 5440 has been construed.*

In *United States* v. *Hirsch* (100 U. S., 33) the court said, referring to section 5440:

> The conspiracy here described is a conspiracy to commit any offense against the

> United States. The fraud mentioned is *any fraud* against them. It may be against the coin, or *consist in cheating the Government of its land or other property.*

Curley v. *United States* (195 U. S., 628; 130 Fed., 1). The indictment in this case, among other things, alleged a conspiracy to defraud under section 5440. It was charged that defendant "H," in order to procure his appointment as letter carrier, a position in the classified civil service, conspired with defendant "C" that the latter would falsely impersonate the former at a civil-service examination, and that, acting in pursuance of this conspiracy, "C" did impersonate "H" at such examination.

The District Court and Circuit Court of Appeals for the First Circuit held the indictment sufficient. A petition for certiorari was denied by the Supreme Court. Arguments for construing the word "defraud" according to its common-law meaning were strongly pressed upon the Circuit Court of Appeals and were concisely and forcibly stated in a brief accompanying the petition for certiorari. All of the arguments that could be advanced for giving to the word "defraud" its common-law significance are clearly answered in the able opinion of Judge Aldrich, speaking for the Circuit Court of Appeals. He said:

> We now come to the main contention of the defense, which is that the conspiracy to deceive, and the acts in furtherance thereof, related to a regulation or a requirement of a Department of the Government and not to the

property or the money of the Government, and therefore that the conspiracy to defraud or deceive is not of a kind contemplated by the sections of the statute under which the indictment was drawn, and thus it will be seen that the question, under the defendant's main contention, is whether the allegations of the indictment, supported by the facts, constitute an offense and justify conviction, and that question depends largely upon the sense in which the word "defraud" was used in the sections of the statute under consideration. Speaking generally, when a word which was used in the old English statutes and in the common law, and which has been accepted as having a particular meaning in the common law, is used in a modern statute, it is ordinarily presumed that the word was used in its common-law sense, but this meaning may be enlarged or limited by its setting in a particular statute. Quite likely the word "defraud" as ordinarily used in the common law, and as used in English statutes and in the statutes of our States, enacted with the object of protecting property and property rights of communities and individuals, as well as of municipal governments, which exist largely for the purpose of administering local financial affairs, has reference to frauds relating to money and property. If this is so, it is because the word is used in that sense, but it may well enough have a broader sense, and be used for a broader purpose.

* * * In view of the history of the sections in question, we have no doubt of the general purpose of Congress to deal with

offenses and wrongs which interfere with the operations of the Government.

Under the rule which permits reference to the object of legislation, we may consider what was to be guarded against and who was to be protected, whether a private right, the public at large, the law, a government, or, in the English sense, the Crown, is the subject to be affected. Therefore the meaning of the word "defraud," when used in the common law or in a statute, is largely influenced by the sense in which it is used and by the subject to which it relates. A statute which, in general terms, has for its object the protection of the individual property rights of the members of the civic body is one thing; a statute which has for its object the protection and welfare of the Government alone, which exists for the purpose of administering itself in the interests of the public, might be quite another thing. The purpose might be broadly different in the two cases.

* * * The word "defraud" may have a different meaning in a statute for the protection of the Government and its administration than when used in a statute designed for the protection of personal rights.

Manifestly, section 5440, in its general terms, contemplates wrongs other and beyond conspiracies to commit distinct statutory offenses against the United States, for, after declaring that if two or more persons conspire to commit any offense against the United States, it broadens the scope of the statute by saying, "or to defraud the United States in

any manner or for any purpose," thus covering frauds and deceptions which are not distinct offenses under Federal laws.

It is perhaps not going too far to say that this section is generic in terms, generic in the sense of including in the first part of the section all conspiracies to commit offenses against the United States—therefore all of a class; and then, under an enlarged scope, embracing all conspiracies to defraud the United States in any manner or for any purpose. It is generic in the sense of including all conspiracies to defraud, thus covering the whole subject of fraudulent conspiracies against the Government; conspiracies to wrong the Government through fraud and deception not constituting an offense, as well as conspiracies to commit offenses against the Government. But whether the statute, accurately speaking, is generic or not it is manifest that the words "if two or more persons conspire * * * to defraud the United States in any manner or for any purpose" have a broader scope and a different sense than the words "if two or more persons conspire * * * to commit any offense against the United States," and, in considering whether a broader scope was intended under the second part of the section than under the first part thereof, the use of the word "either" should be noticed—conspiring "either" to commit any offense or to defraud in any manner or for any purpose.

In considering a statute enacted for the protection of the Government, an entity which, in its right to render service to the people

under wise and beneficient laws, holds property only as an incident of governing, and which declares it a penal offense to conspire to defraud the Government for any purpose, we need not necessarily, we think, approach the question of the interpretation of the word "defraud" from the same standpoint from which the question would be considered if the word "defraud" were used in a State statute enacted for the protection of ordinary property rights of individuals constituting a State; and this is so for the reason that in the one instance the statute in its ordinary acceptation has reference to property and property rights alone, while in the other it has reference to a broader purpose, that of protecting the Government in its administration under the law, as well as protecting the property of the Government which it holds as an incident to the fundamental purpose for which the Government was instituted.

* * * The limited sense in which the word "defraud" was sometimes used in the older statutes had reference to the protection of personal and individual property rights, as, for instance, "if any person shall defraud another," etc. That kind of legislation results, of course, from the purpose of the local government to protect the individual in his natural and fundamental rights to enjoy liberty and acquire property. The fundamental idea of government is not to acquire and enjoy property, but to establish instrumentalities for protecting the people, not only in their individual and property rights, but in the enjoyment of the right and privilege of proper service in all

departments of the Government. The fundamental and chief function of the Government is to administer protection and service to a body of people within its territorial limits. Its property is simply an incident of such administration.

* * * The Government, in respect to its purposes, its rights, and its service, exists in a representative capacity, and in turn its agents, created to administer its purposes, its rights, and its service, are representatives of the Government. Therefore conspiracy to practice a fraud, or a deception which amounts to a fraud, upon an agent or agents of the Government, and doing acts in furtherance of such purpose in respect to property or rights that belong to the Government, whereby the property or the rights of the Government may be destroyed or impaired, is a fraudulent conspiracy within the meaning of the statute in question.

* * * We have spoken of the popular acceptation of the word "defraud," and now as to its legal meaning. In *Burdick* v. *Post*, 12 Barb., 168, 186, it is said to "defraud" is to withhold from another that which is justly due him, or deprive him of a right by deception or artifice, and Bouvier adopts this definition. Thus the word in legal acceptation refers to rights as well as to property and money. Moreover, when the word "defraud" is used in connection with the Government and the law itself, it naturally and necessarily has a broader and a different meaning than when used in connection with personal rights or in connection with individual rights of property.

In *United States* v. *Morse* (161 Fed., 429) one count of the indictment charged a conspiracy to defraud the United States in the exercise of its governmental and fiscal functions by deliberately giving false information regarding the financial condition of the Bank of North America, the fraud resulting in lessening the power of the Government to maintain in efficient condition one portion of the national fiscal system. Upon the authority of the Curley case the court held that a conspiracy to defraud under section 5440 was sufficiently charged.

Judge Hough said, speaking of the first count of that indictment:

> To cause or conceal a rotten spot in the national banking system is an assault on the Government quite as direct and obvious as is foisting into public employment a probably incompetent letter carrier. The doctrine of *Curley's case* (130 Fed., 1; 64 C. C. A., 369) has been approved so often and in so many courts that I consider discussion here useless. Curley's petition for a certiorari and the briefs thereon (195 U. S., 628; 25 Sup. Ct., 787; 49 L. ed., 351) have been submitted to me and carefully examined. The question whether there could be a conspiracy to defraud by merely deceiving a governmental officer, when neither Government nor officer was to be deprived thereby of money or its worth, was presented to the Supreme Court so fully and forcibly, yet so simply and directly, that the refusal of the writ is certainly an authority

> demonstrating the willingness of the highest tribunal to let the law alone. I overrule this branch of the demurrer.

And in the very recent case of *United States* v. *Moses Haas et al.*, not yet reported, Judge Hough, in overruling the demurrer of the defendant, Haas, to the indictments, says:

> Defendant's first proposition is that inasmuch as it is not shown that the United States was deprived of anything of value by the transactions recounted above, no indictment for conspiracy to defraud under section 5440 will lie.
>
> This subject I have recently examined in *United States* v. *Morse* (161 F. R., 429) and need only repeat my conviction that the subject is not open to further discussion in courts of first instance. The indictment charges a confederated effort to deprive the National Government of the right and privilege of proper service in the Department of Agriculture, and that is enough.

This case is one of the so-called "cotton leak" cases, and the charge of conspiracy was (quoting again from Judge Hough's opinion) that:

> Haas et al. agreed with each other and with Holmes that the latter should (and he did), 1st give Haas et al. advance information concerning cotton, contrary to the rules and regulations aforesaid; 2nd, cause to be published (and he did publish) with official approval fraudulently obtained a false crop re-

> port; and, 3rd, that for these services Holmes should receive a percentage of the gains of Haas et al., to be made in cotton speculation based upon their private information, or the public's misinformation, so as aforesaid obtained or brought about.

In *United States* v. *Stone* (135 Fed., 392) defendants were charged under section 5440 with conspiring to deceive inspectors of the United States in the exercise of their official functions by fraudulently inducing them to approve life preservers which did not in fact comply with the requirements of the Federal law. The United States was not in any way interested in the preservers except to see that they fulfilled the conditions of the law. *Held*, that a conspiracy to defraud the United States was sufficiently charged. We quote from the opinion:

> It is also said that the indictment, to be good, must show that the defendants have entered into a conspiracy to violate some criminal statute of the United States. But such construction of the section renders the clause relating to the defrauding of the United States meaningless. The section provides that if two or more persons conspire "either to commit any offense against the United States or to defraud the United States in any manner or for any purpose," they shall, if one or more of them do any act to effect the object of the conspiracy, be liable to a penalty. The defendants' construction of the section would make it apply only to a conspiracy to commit an offense against the United States. It is

evident that the meaning of the section is much broader. If two or more persons conspire "to defraud the United States," not merely contrary to the provisions of any criminal statute, but "in any manner or for any purpose," they shall, if one or more of them do an act to effect the object of the conspiracy, be punishable therefor. May not the United States be defrauded "in any manner or for any purpose" except where it is deprived of its taxes, moneys, or property? If there be a conspiracy between two or more persons to deceive the officers of the Government in their execution of a governmental duty for the purpose of securing their unwitting approval of what the law condemns, is not that a conspiracy to defraud the United States of one of its governmental functions? * * * In *United States* v. *Whalen*, Fed. Cas. No. 16669, Judge Lowell, of the District Court for the District of Massachusetts, declared that the word "conspiracy" in section 5440 has a more comprehensive meaning than is given to it by the common law, "because it includes defrauding the United States in any manner whatever, whether the fraud had been declared a crime by any statute or not," and that the section "has a wide application, and covers all frauds which human ingenuity can devise." In *United States* v. *Thompson* (C. C.), 29 Fed., 86, it was held that the section as it now stands "must be construed to include every conceivable case of conspiracy to defraud the United States; that is, to deprive or divest it of any property, money, or thing otherwise than as the law requires or allows."

In *McGregor* v. *United States* (134 Fed., 187 C. C. A., Fourth Circuit) defendants, employees of the Government, were convicted of conspiring to defraud the Government by having the Government purchase certain articles at excessive prices. The conviction was upheld. In its opinion the court said:

> It may be true that no pecuniary loss would follow the consummation of the conspiracy, and still the result might be that the damage to the Government would be serious and far-reaching. The language of the statute clearly contemplates that the loss or damage may be other than a pecuniary one susceptible of accurate calculation. The words "in any manner or for any purpose" are most comprehensive, and show that the intention of the law-making power was to have the statute as broad and as comprehensive as it could possibly be. It surely is a wrong and a great injury to the Government when any officer or employee of one of its departments conspires with another to do an act the inevitable result of which will be to corrupt the efficiency and impair the usefulness of such department. To hold that such conduct would not be a fraud upon the Government and a loss to it would be as reprehensible as such conduct itself. This statute has, in a number of well-considered cases, been given the construction placed upon it by the court below, and such construction has our approval.

The meaning of the words "conspire to defraud the United States in any manner or for any purpose" has been so frequently considered by the courts that little can be added to what they have said.

The decisions referred to above show that it has long been established that resulting pecuniary loss to the Government is not an essential element of a conspiracy to defraud under section 5440. In the Hyde and Curley cases, *supra*, this court so held. In a recent case (*United States* v. *Lonabaugh*, *supra*), wherein the sufficiency of an indictment charging a conspiracy to defraud the Government of coal lands was questioned, the court said:

> The first question may be disposed of in a word, for it was admitted at the argument, as I understood counsel, that in order to bring the defendants within the meaning of section 5440, Revised Statutes (U. S. Comp. St., 1901, p. 3676), the words "conspiracy to defraud the United States" do not necessarily mean that there shall be pecuniary loss or damage to the Government resulting from false representations made to its officers in the performance of their duties, but that any false practice or trick set in motion for the purpose of inducing the Government officials, in executing the laws of the United States in cases where they must act upon statements made by the parties interested, to act in a way which would be unlawful if the real truth were known is a fraud upon the Government.

A large pecuniary loss to the Government is involved in the conspiracies alleged in the cases at

bar. It is not a mere administrative fraud, for defendants conspired to obtain title to and possession of lands of the United States, a thing of value. But reference is made to the principle above stated to show the absolute inconsistency of the ruling of the District Court, that "defraud" must be given its common-law meaning, with the established judicial construction of the word; for pecuniary loss or damage was a necessary element of defrauding at common law. And yet, as we understand the ruling of the District Court, it would not apply section 5440 to a conspiracy to defraud the United States of valuable land because the common law limited the offense to personalty.

The law punishes a conspiracy to defraud "*in any manner or for any purpose.*" Is it possible that such language needs construction, that Congress and citizens must go to the courts to know what it means? Defendants' contentions would make it necessary for legislators to expressly label all of the common-law words they use, thus: "This word is not used in its common law meaning, but is to be given a broader construction."

It is said Congress intended to punish a conspiracy to defraud only if it "necessarily involve moral turpitude of the basest sort." This can not stand in view of the language of the section. It first refers to conspiracies to commit an offense against the United States and then to conspiracies to defraud. Manifestly it is not necessary for these latter conspiracies to even involve the commission of an offense against

the United States, for the words "or to defraud," etc., would then be surplusage; and yet there are many offenses against the United States which could not be said to involve moral turpitude at all.

In view of the history and plain wording of the statute and of the long and unbroken line of decisions, especially the conclusion of this court recently announced in the Curley case, *supra*, which must be taken to mean that the court does not regard the argument urged by the defendants and adopted by the court below of sufficient importance to warrant discussion in this court, we deem it improper to discuss the technical common-law meaning of the word "defraud." We do not wish, however, to be understood to concede that the District Court has correctly defined a common-law conspiracy to defraud.

Before taking up the charges based upon violations of section 4746, we desire to call attention to the fact that the indictments in Nos. 286 and 291 allege that defendants contemplated making representations that the entrymen were in actual possession of the lands, etc., which representations would be false and fraudulent. From this it appears that the conspiracies included the claim of preferential rights, actual possession being expressly made by law a requisite of such a right. It has not been, and can not be, disputed that such fraudulent representations as to a fact which the *law* makes a condition precedent to a right in themselves make the scheme of defendants a conspiracy to defraud.

V.

Entry under coal-land laws is a matter within the jurisdiction of the Secretary of the Interior within the meaning of section 4746, Revised Statutes.

A. Section 4746 was intended to apply to all matters within the jurisdiction of the Secretary of the Interior.

The District Court held that section 4746 related exclusively to pension and bounty-land matters, but expressed its willingness to waive its view in this particular by reason of two unreported cases in which it had been held that the words "pertaining to any other matter within the jurisdiction of the Secretary of the Interior" must be interpreted according to their plain and literal meaning, and therefore did include matters pertaining to coal-land entries.

The cases referred to are *United States* v. *Dodson*, decided by Judge Philips, and *United States* v. *Fout*, decided by Judge Amidon, in United States District Courts in the Eighth Circuit. Judge Philips, in his opinion, said:

> The contention is that under the rules of *ejusdem generis* the general expression in this statute following the particular expression should be limited to acts of like character and kind; as where in a contract or statute there are particular things designated specifically and that is followed by a general phrase which has no other predicate than its precedent it has reference to either the things particularized or to things and acts of like character and kind. But that rule has its exception, which

> is as well established as the rule itself, as recently declared by the Court of Appeals in its late session at St. Paul, in *Lindeka et al.* v. *Associated Realty Company*, opinion not yet published. The distinction is this: Where there is found in the instrument a subject-matter distinct to which the general expression may be referred, it saves it from the operation of the general rule. * * * This act of 1898 goes further, and after specifically referring to any claim for pension or the payment thereof, "or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions," it says "*or of the Secretary of the Interior.*" So that Congress has purposely extended this statute to "any other matter within the jurisdiction of the Secretary of the Interior." That made this amendatory statute as broad as the subject-matters coming within the purview of the jurisdiction and action of the Secretary of the Interior committed by the statute to his jurisdiction and management wherein he makes regulations. Of course, where an amendment of that character is made so distinct, with such a specification as that, it is the office of the court to give operation to it in order to effectuate and carry out the legislative intent in making it.

Judge Amidon said upon this point:

> We feel that we are required to give it larger meaning than that which was urged upon us by counsel for defendant, or else the added language which is found in this amendment is given no force or effect whatever and

> the amendment itself is rendered nugatory. If it is to be confined entirely to pension matters, then the original act was sufficiently comprehensive for that purpose, and of course it is one of the cardinal rules of construing statutes that they shall be construed so as to give effect to all their provisions, if that is possible.

It is true that statements were made in Congress when passage of this law was under consideration which would tend to show that the amendment of the statute was intended to apply particularly to pension and bounty-land matters. The class of false and fraudulent statements involved in the present indictments was not discussed when the bill was under consideration. While the legislative history of a measure is entitled to due consideration in explaining the meaning of ambiguous language contained in it, when its language is plain and unequivocal the fact that the full purport of this language has not been alluded to or even understood by speakers in the debate preceding its adoption constitutes no sufficient reason for excluding from its provisions a case embraced within them and included within the mischief against which the statute is aimed.

Justice Peckham, in the *Freight Association case* (166 U. S., 290, 318), said:

> Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority

> of the members of each House in relation to the meaning of the act. It can not be said that a majority of both Houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts from the language used therein.
>
> There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. * * *
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.

Clearly, the purpose of the amendment of 1898 was to extend the operation of the statute, and for this purpose the words "Secretary of the Interior" were added. In conformity with this purpose of broadening the scope of the statute, these words should be construed broadly.

B. *Jurisdiction of the Secretary of the Interior extends to coal-land entries.*

Judge Amidon, in the opinion above referred to, said upon this point:

> The determination of the demurrer which was interposed to the evidence, before the noon recess, depends upon the meaning of the term "jurisdiction" as used in the statute under which the indictment was drawn. In the phrase, "or pertaining to any other matter within the jurisdiction of the Secretary of the Interior," that word has a double meaning. It may mean simply authority to hear and determine a class or matter. That is the kind of jurisdiction conferred by law and is sometimes spoken of as "jurisdiction of the subject-matter," or it may be used in a much more restricted sense as pertaining to the authority to try a specific matter or thing; and when the term "jurisdiction" is used in that sense, the tribunal must have not only authority to try the class of matter presented, but it must also have the authority over the parties in the controversy.
>
> Now, in order to have jurisdiction of a specific suit, or a specific matter, when the term "matter" is used as synonymous with suit or action, the court, officer, or tribunal must have authority conferred upon it by law to hear and adjudicate in respect of the class of matter involved; and must also have obtained jurisdiction of the parties to the controversy, by reason of the service of some

notice or process, so as to bring the particular controversy before the court.

Now, if the term "jurisdiction" here used in that restricted sense, as meaning authority to try a particular case or matter, then this demurrer ought to be sustained.

But if the term "jurisdiction" is used in the general sense as meaning simply authority conferred by law to try and pass upon the class of matter of which the one under consideration is a specific instance, then the demurrer ought to be overruled.

After careful consideration—such consideration as we have been able to give it in the short time and after conference together—it has seemed to us that the term "jurisdiction" is used in its larger sense. And that any false or forged paper which might properly be used in any one of the class of matters over which the Secretary of the Interior is given authority by law comes within the inhibition of this statute.

Having adopted that construction of the term "jurisdiction," it only remains to look at the statute to determine whether this false instrument referred to in the indictment relates to a matter of which the Secretary of the Interior is given jurisdiction by law.

The law is very plain upon that subject. The statute in one of the earlier provisions, section 441, gives the Secretary of the Interior jurisdiction over all matters pertaining to the public land.

Clearly the word "jurisdiction" in this statute was not used in its technical sense, but was intended to include everything of which the Secretary of the Interior is by law given supervision of. Jurisdiction of one of the Executive Departments is here referred to as distinguished from the jurisdiction of the other Executive Departments.

The Revised Statutes make it clear that the matter of coal-land entries was within the jurisdiction of the Secretary of the Interior.

Section 437 provides that there shall be a "Department of the Interior and a Secretary of the Interior who shall be the head thereof."

Section 441 provides: "The Secretary of the Interior is charged with supervision of public business relating to the following subjects * * * the public lands, including mines."

Section 446 provides: "There shall be in the Department of the Interior a Commissioner of the General Land Office."

Section 453 provides: "The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties pertaining to the surveying and sale of the public lands of the United States or in anywise respecting such public lands * * * and the issuing of patents for all grants of land under the authority of the Government."

It will be noted that these last two sections are in the same language as corresponding sections creating

the office of and defining the duties of the Commissioner of Pensions (sections 470, 471).

Section 2478 provides: "A Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise provided for." (The statutes relating to coal land entries are included in the "title" referred to.)

Section 2234 provides for the appointment of a register of the land office and a receiver of public moneys for each land district established by law, who shall have charge of and attend to the sale of public lands within their respective districts, as provided by law and official regulations.

See also sections 2248, 2252, 2254, and 2255.

While the statutes in reference to coal-land entries do not mention the Secretary of the Interior, the sections of the Revised Statutes just referred to make it clear that the Commissioner of the General Land Office and the registers and receivers of land offices perform their duties relating to coal-land entries entirely under the supervision and subject to the control of the Secretary of the Interior. Such matters are within the jurisdiction of the Secretary of the Interior.

VI.

The regulations of the Interior Department referred to in these cases are authorized by law and may furnish the occasion for commission of a crime under section 5440 or 4746.

The regulations of the Interior Department provide that one who desires to take advantage of the coal-land laws must file an application in the form of an affidavit stating, *inter alia*, that he makes application in good faith for his own benefit and not directly or indirectly, in whole or in part, in behalf of any other person or persons whomsoever. This is the principal regulation involved in these cases and is the only one that has been attacked as unauthorized.

The law provides, in substance, that every person having certain qualifications, or association of persons severally qualified, shall, upon application to the register of the proper land office, have the right to enter any vacant coal lands not exceeding 160 acres to each individual or 320 acres to such association, upon making certain payments; that only one entry can be made by the same person or association of persons, and that no association of persons, any member of which shall have taken the benefit of such laws, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof, and that no member of any association which shall have taken the benefit of such laws shall enter or hold any other lands under

their provisions. The Commissioner of the General Land Office is then authorized to issue all needful rules and regulations for carrying these provisions into effect.

As heretofore pointed out, the regulation in question merely requires a positive statement of what it would be in violation of the statute and a fraud to conceal.

The law in limiting the area one person or association may acquire necessarily contemplates that entry shall be made solely for the benefit of the entryman; for, otherwise, the limitation would be wholly ineffectual. The Government could not otherwise adequately protect itself against fraud.

It is necessary in the administration of this law that the officers should deal directly with the entryman. The statute, when it says, "every person * * * shall upon application * * * have the right to enter," means that one shall have the right to enter when he makes his own application and acts exclusively for himself and not when another makes an application for his benefit or when one makes an application for another's benefit.

The regulation does not take from anyone a right conferred by the law; it does not deprive anyone who is given by the statute the right to enter of that right, nor does it require of him anything except what the statute itself contemplates.

It is entirely within his authority for the commissioner to require that the statement be made under

oath. An oath is always a strong preventive of false statements and in seeking to protect the Government from fraud it was needful to have the statement made in the form of an affidavit.

However, this is not a prosecution for perjury. False or fraudulent declarations, papers, or writings which are not sworn to may be made the subject of prosecution under section 4746 as well as sworn statements; and sworn statements are not essential to a prosecution under section 5440. Therefore all allegations in the indictments that the affidavits were forged, fictitious, and feigned by reason of not being made under oath, etc., as well as reference to the fact that some of the statements were made under oath, may be treated as surplusage and the remaining allegations in the indictment would still be sufficient.

It was contended that the regulations must be disregarded as they can not form the basis of a crime.

We have already shown that it is not necessary to rely upon regulations in order to support the charges of conspiracy to defraud. For like reasons they are not essential to the charge of violations of section 4746. The law itself requires the application to be filed, and even if the application omitted all reference as to whose benefit the entry was made for and contained no positive misrepresentation of fact, it was a false and fraudulent paper or writing, because it was made and filed as a necessary part of a fraudulent scheme, and because of what was fraudulently concealed in connection with its filing, namely, that the application was made for the benefit of one who was

disqualified from making it. Moreover, other misrepresentations of fact which the law itself requires to be truly stated were contemplated or made in the writings referred to in the second count of the indictment in No. 286 and in the indictment in No. 292. In the former false statements in writing that the entryman was in actual possession of the land were charged and in No. 292 the statements in the affidavits that the affiant and her grantor had expended a certain sum in developing coal lands on the tract in question, that she had located and opened a coal mine thereon, and that she was in actual possession thereof, were charged to be fraudulent.

The regulations here referred to, however, may furnish an opportunity for commission of a crime defined and punished by statute. It is only in that way that they are relied upon in these cases. These cases are ruled by *Caha* v. *United States*, 152 U. S., 211. In that case plaintiff in error had been found guilty of perjury in a contest pending in a land office under the homestead laws. A demurrer to the indictment had been overruled. One ground of this demurrer was that the indictment stated no offense, which point was considered by the Supreme Court. It was contended that the statute made no provision for such a contest and that as the statute did not authorize such contest it could not be said that the oath was taken in a "case in which a law of the United States authorizes an oath to be administered." After saying that if such a contest before the local land

officers is not in terms provided for, it is certainly recognized in the statutes, Chief Justice Fuller says:

> General rules of practice have been adopted and promulgated by the Interior Department. * * * By these rules of practice express provision is made for a contest before the local land officers in respect to homestead as well as preemption entries, and for the taking of testimony before such officers and a regular formal trial, with the right of appeal to the Commissioner of the General Land Office, and therefrom to the Secretary of the Interior.
>
> We have, therefore, a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land; a specific act of Congress authorizing contests before the local land offices in cases of preemption; rules and regulations prescribed by the Land Department for contests in all cases of the disposition of public lands, including both preemption and homestead entries, and the frequent recognition by acts of Congress of such contests in respect to homestead entries. Clearly, then, within the scope of section 5392, the local land officers in hearing and deciding upon a contest with respect to a homestead entry constitute a competent tribunal, and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered.
>
> This is not a case in which the violation of a mere regulation of a Department is adjudged a crime. *United States* v. *Bailey*, 9 Pet., 238, is

in point. There was an act of Congress making false testimony in support of a claim against the United States perjury, and the defendant in that case was indicted for making a false affidavit before a justice of the peace of the Commonwealth of Kentucky in support of a claim against the United States. It was contended that the justice of the peace, an officer of the State, had no authority under the acts of Congress to administer oaths, and that, therefore, perjury could not be laid in respect to a false affidavit before such officer. It appeared, however, that the Secretary of the Treasury had established, as a regulation for the government of his Department and its officers in their action upon claims, that affidavits taken before any justice of the peace of any of the States should be received and considered in support of such claims. And upon this the conviction of perjury was sustained, Mr. Justice McLean alone dissenting. It was held that the Secretary had power to establish the regulation and that the effect of it was to make the false affidavit before the justice of the peace perjury within the scope of the statute, and this notwithstanding the fact that such justice of the peace was not an officer of the United States. Much stronger is the case at bar, for the tribunal was composed of officers of the Government of the United States; it was created by the Land Department in pursuance of express authority from the acts of Congress. This perjury was not merely a wrong against that tribunal or a violation of its rules or

requirements; the tribunal and the contest only furnished the opportunity and the occasion for the crime, which was a crime defined in and denounced by the statute.

Nor is there anything in the case of *United States* v. *Eaton*, 144 U. S., 677, 688, conflicting with the views herein expressed. In that case the wrong was in the violation of a duty imposed only by a regulation of the Treasury Department. There was an act entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," which contained several sections forbidding particular acts, and imposing penalties for violation thereof. And in addition there was a general provision in section 18 that "if a party shall knowingly, or willfully, omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do any thing by this act prohibited * * * he shall pay a penalty," etc. There was authority given to the Commissioner of Internal Revenue to make all needful regulations for carrying into effect the act. In pursuance of that authority the Commissioner required the keeping of a book in a certain form and the making of a monthly return—matters which were in no way referred to in the various sections of the statute prescribing the duties resting upon the manufacturer or dealer in oleomargarine, although subsequently to this statute, and subsequently to the offense complained of, and on October 1,

1890, Congress passed an act, by section 41 of which wholesale dealers in oleomargarine were required to keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue should require. It was held by this court that the regulation prescribed by the Commissioner of Internal Revenue, under that general grant of authority, was not sufficient to subject one violating it to punishment under section 18. It was said by Mr. Justice Blatchford, speaking for the court:

"It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the act of October 1, 1890.

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do

> the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."
>
> This, it will be observed, is very different from the case at bar, where no violation is charged of any regulation made by the Department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the Department, at which the defendant committed the crime of perjury in violation of section 5392. We have no doubt that false swearing in a land contest before the local land office in respect to a homestead entry is perjury within the scope of said section.

The Caha case can not be distinguished from the present cases.

In re Kollock, 165 U. S., 526, is also to the same effect.

In the present cases the defendants are not charged with a violation of or a conspiracy to violate the regulation which requires an entryman to state in writing that he is making the entry solely for his own benefit and not for the benefit of another. The entrymen made or were to make the statement which the regulation required, and in this way were to comply with the regulation rather than to violate it, but in making such statement falsely and fraudulently and filing it they committed or would commit crimes defined and punished by sections 5440 and 4746. Clearly the regulation, as in the Caha case, merely furnishes the opportunity for the commission of a statutory crime.

Likewise, in filing what purported to be affidavits, but which were in fact forged, fictitious, and feigned, the defendants would be violating the statutes; the regulations in providing that they should be filed merely furnishing the occasion for the criminal acts, as the regulations constituting a tribunal to hear land contests did in the Caha case, and as regulations of the Secretary of the Treasury, providing that affidavits taken before any of the justices of the peace of any State, did in the Bailey case.

VII.

Technical objections to indictments.

Technical objections were made to the indictments, none of which were referred to or relied upon by the court in its decision. Only brief reference need be made to them.

The indictments were attacked because the regulations referred to therein were not set out. But as these regulations were authorized by section 2351, Revised Statutes, the court will take judicial notice of them. (*Caha* v. *United States*, 152 U. S., 211, 221, and cases there cited.)

It was said that there are two classes of entries with distinct rules and regulations (cash coal entries and preference entries) and defendants could not know which set was involved in the charges. It was unnecessary to designate them with greater particularity. It must be assumed that the conspiracy con-

templated entries of land under all of the regulations or that the conspiracy was not sufficiently definite in this respect to permit the pleader to designate the regulations with greater particularity than has been done. In *Williamson* v. *United States* (207 U. S., 425) it was held that an indictment for conspiracy to suborn perjury need not name the persons to be suborned because the conspirators might not have determined who would be suborned. In *Dealy* v. *United States* (152 U. S., 539) this court held that in an indictment charging conspiracy to defraud the United States of public lands it is not necessary to describe the lands of which the United States was to be defrauded.

Some of the indictments were claimed to be uncertain because the affidavits and other papers referred to therein were not set out or sufficiently described in some instances and for various other reasons. It was not necessary to set the papers out for they are only incidental and do not form the gist of the offense. For reasons just stated it was entirely unnecessary to refer to any specific affidavits or papers in charging a conspiracy. In setting out overt acts the papers are described, for example, as "Entry No. 246 of one Fred William Margenau" "and the papers, statements, and affidavits therein, to wit, declaratory statements, power of attorney, nonmineral affidavit, corroborating nonmineral affidavits, and application at purchase" for certain described coal lands. This description, without setting the papers out at length, meets all requirements of the law as established by this court.

In *Cochran and Sayre* v. *United States* (157 U. S., 286, 290) it was said:

> But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

In *Tubbs* v. *United States* 105 Fed., 59 (C. C. A.), it was claimed that the papers forming the basis of the indictment should be set out. The court there said:

> Defendants in this class of cases commonly affect ignorance of what they are indicted for, and great apprehension lest they shall be indicted a second time for the very same offense, and be unable to prove by the record a former conviction or acquittal. No case of the kind has ever occurred, or is ever likely to occur, but the affected apprehension of each defendant that it may occur in his case is perennial. The Supreme Court has put a quietus on these stock objections by repeatedly pointing out that the defendant may apply for a bill of particulars (*Rosen* v. *United States.*, 161 U. S., 29, 34, 35, 39–41; *Durland* v. *U. S.*, 161 U. S., 306, 315), and that parol evidence is always admissible, and sometimes necessary to establish the defense of prior conviction or

acquittal. (*Dunbar* v. *U. S.*, 156 U. S., 185, 191; *Durland* v. *U. S.*, 161 U. S., 306, 314, 315.)

A mere reading of the indictments shows that they are sufficiently certain in every particular to meet all requirements of the law.

It was contended that the averment in the indictment in the Keitel case that defendants "in the county of Garfield, in the county of Routt, in the county of Denver, and within the said district of Colorado, and within the jurisdiction of this court, did then and there" conspire, renders the indictment bad on account of duplicity. Manifestly it was intended to allege a single conspiracy, formed and existing in all three counties, all of which were within the jurisdiction of the court and not a separate conspiracy in each county.

The second count of the indictment in No. 286 was said to be bad because it charges certain acts were to be done in violation of section 4746 of the Revised Statutes, without adding the words "as amended." The count is obviously based upon the statute as amended, so that no one could be misled by this reference to the statute. It was entirely unnecessary to add the words "as amended," for it must be presumed that reference was made to the law as it stood when the indictment was returned. It was also unnecessary to refer to a particular statute and as the count concluded with the general language "contrary to the form, force, and effect of the statute of the

United States of America in such case made and provided," the reference to section 4746 may be treated as surplusage. (*Mayer* v. *State*, 64 N. J. L., 323; *State* v. *Dewey*, 35 Vt., 550; *Rawlings* v. *State*, 2 Md., 201; *Oshe* v. *State*, 37 Ohio, 494.) It would necessarily have to be so treated if it refers to a repealed law, as contended by defendants.

It was said that the first count of the indictment in No. 286 and the indictments in Nos. 287 and 291 were bad because several offenses were charged, namely, defrauding the United States of lands, of its governmental function, of its right to administer an intelligent and honest service, etc. There is but one offense charged in each indictment or count—a conspiracy to defraud the United States. The Government could not be defrauded of its lands in the manner set out in the indictment without at the same time being defrauded of its governmental function, right to administer an intelligent and honest service, etc. The gist of the crime charged is the conspiracy, and the fact that a conspiracy is alleged to embrace defrauding the Government of several different things does not render it bad for duplicity. As well might it be contended that there is duplicity because it is alleged that the conspiracy contemplated defrauding the Government of several different pieces of land.

It was also contended that the character of the lands forming the subject of the conspiracy was not sufficiently set out in the indictment in No. 287.

The indictment referred to them as "coal lands" and as "lands of the said United States chiefly valuable for the deposits of coal therein, situate within said land district and open to entry and purchase as coal lands at the said land office, under the laws of the United States relating to the entry and sale of coal lands and the rules and regulations then in force." This clearly describes the nature of the lands. No question as to whether the lands were in fact technically coal lands can be raised upon demurrer.

In No. 292 it was contended that neither of the counts sufficiently described the matter within the jurisdiction of the Secretary of the Interior in which the affidavits were filed. The affidavits are set out in full and clearly show the matter in which they were filed; as, for instance, in the affidavit embodied in the first count, it is clear that the affiant was making and filing the affidavit in support of her claim therein described as a claim "under provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States and under coal land declaratory statement No. 756, filed in the land office aforesaid on the 8th day of November, A. D. 1905, by him, by Charles E. Herr, attorney in fact, the preference right to purchase" lands described therein. It is clear that the indictment in referring to a "certain matter hereinafter described" and to "said matter within the jurisdiction of the said Secretary" refer to the claim described in the affidavit. No one can be misled by these averments nor is it left uncertain as to what the matter is.

The claim made in No. 292 that it was necessary in order to charge an offense under section 4746, to allege the affidavits related to some *claim* is without merit. By the terms of the statute they may relate to a "claim for pension" *or* to "any other matter," etc. It is sufficient to allege that the affidavits related to a "matter."

We beg to submit that the judgments below should be reversed and the causes remanded to the trial court with directions to proceed therein in accordance with law.

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